Supreme Court, U.S.
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NO. 89-74

IN THE

SUPREME COURT OF THE UNITED STATES

DOROTHY L. NOBLE,
Petitioner

vs.

JOHN S. HERRINGTON,
SECRETARY, U.S. DEPARTMENT
OF ENERGY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES OF APPEALS FOR THE
D.C. CIRCUIT AT NO. 88-5139

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Questions Presented for Review

1. Is The Denial Of A De Novo Review For Ms. Noble's Retaliation Claim By The United States District Court For The District Of Columbia A Palpable Error Of Law Where This Court And The Majority Of Circuit Courts Hold That A Federal Employee Is Entitled To A Trial De Novo In An Action Under § 717 Of Civil Rights Act Of 1964, As Amended (42 U.S.C. § 2000 e-16), Against The Employing Agency For Job-Related Discrimination?

2. Did The District Court And The District Of Columbia Circuit Court Of Appeals Err By Refusing To Apply The Constructive Discharge Standard Set Forth In Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1978) Which Allows Relief When The Working Conditions Are Made So Intolerable That It Drives An Employee Into An "Involuntary Quit?"

3. Did The District Court Err By Failing To Award Ms. Noble Attorney Fees Where She Satisfied The Requirement Under Title VII Of Alleging A Claim That Was Colorable Under The Civil Rights Laws?

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Reference to Reports of Opinions Below

The reports of both the District Court and the District of Columbia Circuit Court are not known to be reported. A copy of the opinions are set forth in the Appendix attached hereto.

Statements of Grounds for Jurisdiction

This Court has jurisdiction by virtue of the act of June 25, 1948 c. 646 § 1, 62 Stat. 928; 29 U.S.C. 1254(1). Review to be of Jan. 19, 1989 U.S. Court of Appeal's Summary Affirmance, and April 17, 1989 Denial of Petition for Re-hearing.

Constitutional Provisions and Statutes Involved

1. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-16
2. 28 U.S.C. § 1254 (1)
3. 42 U.S.C. § 2000 e-5(g)
4. 28 U.S.C. § 1343
5. 42 U.S.C. § 2000 e-5(k)
6. 42 U.S.C. § 2000 e-3(a)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

DOROTHY L. NOBLE,

Petitioner

vs.

JOHN S. HERRINGTON,
SECRETARY, U.S. DEPARTMENT
OF ENERGY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE D.C. CIRCUIT,
AT NO. 88-5139

Statement of the Case

This Petition seeks review of a final judgment of the D.C. Circuit Court of Appeals. The District Court's subject matter jurisdiction was based upon a Federal questions arising from the following: 42 U.S.C. § 2000 e-5(g), 42 U.S.C. § 2000 e-16, an amount in controversy in excess of $10,000.00 and 28 U.S.C. § 1343.

Procedural History

On December 27, 1979, Petitioner, Dorothy L. Noble, hereinafter referred to as Ms. Noble, filed a formal complaint of discrimination with the Department of Energy's Equal Employment Opportunity office against the Respondent, United States Department of Energy, hereinafter referred to as "DOE," for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (e), et seq., as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000 e-16.

On October 6, 1981, Ms. Noble filed a second Complaint with DOE concerning continued discrimination and acts of retaliation with respect to her initial complaint of December 27, 1979. On January 12, 1982, Ms. Noble received

notice that DOE had rejected the reprisal complaint. Ms. Noble appealed to the Equal Employment Opportunity Commission ("EEOC") on February 27, 1982.

The DOE investigation of Ms. Noble's sexual discrimination complaint culminated in an agency finding of no discrimination based on sex. Ms. Noble exercised her right to an agency hearing and on July 7 and 8, 1982, portions of the complaint were heard before an EEOC Attorney Examiner.

During a continuance of the July 1982 hearing, the EEOC Office of Review and Appeals reversed the DOE decision which rejected the October 6, 1981 reprisal complaint. A hearing was held on the two consolidated complaints on December 6th through the 9th and the 13th through the 15th of 1982.

The EEOC Attorney Examiner issued his Recommended Decision on July 18, 1984 finding that Ms. Noble's co-workers acted in retaliation for Ms. Noble's filing her agency reprisal complaint. Appendix A, pp. 36-A--43-A. However, this retaliation charge was limited to 1) the open letter, and 2) the "group grievance." EEOC also found that DOE management tacitly approved of Ms. Noble's co-worker's acts of retaliation. Appendix A, p. 44-A EEOC further found that the acts of retaliation were not so intolerable as to amount to a constructive discharge, and that Ms. Noble did not sustain her burden of proving sex discrimination by a preponderance of the evidence. Appendix A, p. 48-A. The Decision recommended that Ms. Noble be awarded attorney's fees consistent with the finding of retaliation and that DOE educate Ms.

Noble's former co-workers as to their responsibility to respect the grievance/arbitration and/or the employment discrimination process. Appendix A, p.49-A-51-A. DOE accepted the EEOC Recommended Decision on July 25, 1984 and an attorney fee Petition was submitted. On January 17, 1986 an order was entered by the United States District Court for the District of Columbia Circuit Court denying Ms. Noble's Petition for Attorney's Fees. Appendix B.

On February 16, 1988, the United States District Court for the District of Columbia entered partial summary judgment for Ms. Noble on the reprisal claim and for DOE on the sexual discrimination and constructive discharge claims, but refused to grant the full relief recommended by the EEOC. Appendix C.

Counsel withdrew, and Ms. Noble appeared pro se before the Court of Appeals. On January 19, 1989, the Court of Appeals of the District of Columbia Circuit summarily affirmed the District Court's ruling and on April 17, 1989 denied Ms. Noble's Petition for Re-hearing. Appendix D.

Statement of Facts

Petitioner, Dorothy L. Noble, was employed as a Publications and Marketing Specialist, GS-13, in the office of Energy Information Services (DOE) until her early retirement on September 26, 1981. Prior to the filing of a discrimination complaint, Ms. Noble employment had a 24 year unblemished record as a Federal Government Employee.

On December 27, 1979, during her tenure with the DOE, Ms. Noble filed an Administrative Complaint alleging discrimination against her on the basis of sex.

Upon Ms. Noble's early retirement, she filed a second Administrative Complaint on October 6, 1981, charging in part that in a variety of ways, and DOE Management retaliated against her for filing her

first complaint and for pursuing discrimination remedies. Ms. Noble chose early retirement because the humiliating working environment she was subject to each day became more than she could endure.

Prior to and after filing her first sexual discrimination claim, Ms. Noble was subject to a continuous pattern of discriminatory treatment encompassing: 1) deprivation of opportunities for promotion, lateral transfer, increased supervisory training and professional recognition; 2) restriction of her work, and her loyal subordinates; and 3) assignment of inappropriate demeaning tasks.

Moreover, Ms. Noble's initial complaint was openly circulated throughout the OEIS office by her Supervisor, John Daniels; thus forming a

so-called biased clique against her. This precipitated the filing of a "group grievance" with the employee union against Ms. Noble by her co-workers. Appendix E, pp. 1-F--44-E.

Persistent retaliation through 1980 and 1981 subjected Ms. Noble to daily taunting and teasing by her co-workers including such puerile acts as: 1) cutting Ms. Noble's telephone wires; 2) stealing her telephone's microphone and transmitter; 3) placing cotton in her telephone's mouth piece; 4) stealing file boxes from her office; 5) stealing wheels from her chair causing her to fall; and 6) falsifying messages from her superiors.

Ms. Noble's second administrative complaint was filed due to the aforementioned retaliatory measures and the denial for promotion to a vacant GS-

14 position within the OEIS. Ms. Noble was fully qualified for the position, having temporarily filled the same position during the Summer of 1978 when it was classified on a GS-15 director's level. However, the vacancy was cancelled and subsequently non-competitively filled by a male.

EEOC's recommended decision in favor of a limited retaliation claim and Ms. Noble's supervisor's tacit agreement thereto was adopted by the DOE. Subsequently, Ms. Noble appealed this complaint within the allotted thirty (30) day period to the United States District Court for the District of Columbia hoping for a de novo review of her retaliation, sexual discrimination, and constructive discharge claims.

Unfortunately however, the District Court was predisposed to the biased

clique's point of view and denied Ms. Noble her legal right to de novo review of the retaliation claim. The District Court trivialized this portion of her claim, and refused Ms. Noble the right to submit additional evidence on this point, stating, in effect, 'She got what she deserved.' Appendix C, p. 32-C.

The District Court erroneously held that the majority of courts, including the United States Court of Appeals for the District of Columbia Circuit, have not yet decided whether an unappealed EEOC decision in an employee's favor is entitled to enforcement in a subsequent lawsuit on the same claims.

The District Court further mistakenly applied non-binding cases outside of its jurisdiction which deny de novo review of the merits, as long as the relief ordered was within the EEOC's authority. The

District Court admits these arguments as merely persuasive and clearly avoids all binding authority which grants de novo review in such a case.

Thus, the Court made a palpable error of the law by holding that it would do no more than enforce the reprisal decision rendered by the EEOC. Appendix C, p. 13-C.

As a result of this inequity and bias that abounded throughout the courtroom, the District Court found against Ms. Noble on both her sexual discrimination and constructive discharge claims. Moreover, the Court denied her any monetary relief for the reprisal she suffered, including the denial of EEOC's recommended attorney's fees guaranteed under Title VII, 42 U.S.C. § 2000 e-5(k). Appendix B.

Reasons for Granting Petition for Certiorari

This application presents a highly controversial issue concerning violation by a Federal Agency of Title VII of the Civil Rights Act of 1964, amended by the Equal Employment Opportunity Act of 1972, that involves conflicting Federal Court opinions and general confusion among the legal community which practice in the area.

The question of whether the plain language and the legislative history of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000 e, et seq.), clearly expresses the congressional intent to grant a de novo trial to a federal employee in his action alleging job-related discrimination by the employing agency is squarely presented for determination.

Such a question was decided in the affirmative by this Court in Chandler v. Roudebush, 425 U.S. 840, 48 L.Ed.2d 416, 96 S.Ct. 1949 (1976).

In addition, the District of Columbia Circuit Court and District Court have repeatedly reaffirmed this position. Weahkee v. Perry, 587 F.2d 1256 (1978); Hackley v. Roudebush, 171 U.S.App.D.C. 376, 381, 520 F.2d 108, 113 (1976); Williams v. Bell, 587 F.2d 1240 (1978); Scott v. Baldridge, 609 F.Supp. 330 (D.C.D.C. 1984); and Kyless v. Secretary of Agriculture, 604 F.Supp. 426 (D.C.D.C. 1985).

The question of whether an employer deliberately making working conditions so intolerable as to drive the employee into an early retirement, constitutes constructive discharge is also presented.

Prior to Clark v. Marsh, 665 F.2d 1168 (1981), the United States District Court of Appeals for the District of Columbia Circuit had not previously addressed the issue of constructive discharge in a Title VII context. In Clark, the Appellate Court overwhelmingly held that a Title VII plaintiff need not remain on the job to mitigate damages when that job presents "such an aggravated situation that an employee would be forced to resign." id. at 773.

In general, the courts join in stating that a "finding of constructive discharge depends on [whether the employer] deliberately made working conditions intolerable and drove [the employee] into an "involuntary quit." Retail Store Employees Union Local 880 v. NLRB, 419 F.2d 329, 332 (D.C. Cir. 1968),

quoting NLRB v. Tennessee Packers, Inc., 339 F.2d 203, 204 (6th Cir. 1964).

The final question of whether the District Court erred by failing to award Ms. Noble attorney fees where she satisfied the requirement under Title VII of alleging a claim that was colorable under the Civil Rights laws is presented.

Such a question was decided in the affirmative by the United States Court of Appeals, District of Columbia Circuit in Miller v. Staats, 706 F.2d 336 (D.C. Cir. 1983); such a finding is consistent with 42 U.S.C. § 2000 e-5(k).

EXPANDED ARGUMENT

I. Is The Denial Of A De Novo Review For Ms. Noble's Retaliation Claim By The United States District Court For The District Of Columbia A Palpable Error Of Law Where This Court And The Majority Of Circuit Courts Hold That A Federal Employee Is Entitled To A Trial De Novo In An Action Under § 717 Of Civil Rights Act Of 1964, As Amended (42 U.S.C. § 2000 e-16), Against The Employing Agency For Job-Related Discrimination?

It is settled that § 717(c) entitles a Federal employee to a de novo proceeding in District Court upon a Complaint of employment discrimination. Chandler v. Roudebush, 425 U.S. 840, 864, 48 L.Ed.2d 416, 96 S.Ct. 1949 (1976); Hackley v. Roudebush, 171 U.S.App.D.C.

376, 381, 520 F.2d 108, 113 (1976); Weakhee v. Perry, 582 F.2d 1256, 1263 (D.C. Cir. 1978).

In Chandler, this court unanimously held that under Title VII, a Federal employee must be accorded the same right to a trial de novo as a private sector employee. 425 U.S. 840, 48 L.Ed.2d 433, 96 S.Ct. 1949.

In Hackley, the Appellate Court quickly pointed out, "this does not mean that the administrative record, which has been developed, is to be disregarded, nor does it foreclose the possibility of summary judgment. On the contrary, the District Court may consider the administrative record as evidence to be accorded whatever weight the court deems appropriate. Additional testimony, if any, should supplement the administrative records as necessary to enable the court

to decide the case." 171 U.S.App.D.C. at 418, 520 F.2d at 150.

In Weakhee, the appellate court firmly held, however, the principle which should guide the court's analysis of a Title VII case is that there is to be fresh determination of the facts and issues by the district court. 587 F.2d at 1263.

Ms. Noble was denied her right to a de novo review of the reprisal claim against the DOE. The district court denied Ms. Noble additional testimonial evidence to supplement the administrative record. The district court held:

> ". . . .plaintiff must choose one consistent course on the reprisal claim; she cannot seek enforcement of the EEOC decision and put forth additional evidence of alleged acts of reprisal that did not figure into the hearing examiner's decision."

> "Pursuant to case law and regulation, the court must enforce the reprisal decision rendered by the EEOC and adopted by the agency - - and it will do no more. Plaintiff was permitted to go to trial on the reprisal claim, and to put forth evidence that allegedly supported the claim, only because the timing of plaintiff's motion forced the Court to refrain from ruling on the motion until it had sufficient time to study the relevant law. That having been done, the Court cannot re-examine the rejected portions of plaintiff's reprisal claim." Appendix C, pp. 10-C--14-C.

In this reasoning, the United States District Court for the District of Columbia committed a palpable error of law. The Court erroneously applied misstated law and unfairly denied Ms. Noble her Title VII right to a plenary judicial proceeding which should have included discovery and a full evidentiary

hearing regardless of the status of the administrative record. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (19); Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L.Ed.2d 147, 74 S.Ct. 1011 (1974).

Moreover, Toney v. Block, 705 F.2d 1364 (1983), used by the district court to deny Ms. Noble a de novo review of her reprisal claim clearly notes that, "Unquestionably, the Examiner's findings are not binding upon the appellant, since it is clear that he is entitled to a trial de novo." id. at 1366. More egregious yet, is the fact that Toney clearly cites to the authority of Chandler v. Roudebush, 425 U.S. 840, 48 L.Ed.2d 416, 76 S.Ct. 1949 (1976).

The district court clearly misapplied the law. Such misapplication is inconsistent with this court's holding

and the majority of circuit courts. Moreover, such misapplication has consequently denied Ms. Noble her legal right to constructive discharge, relief, and attorney's fees.

II. Did The District Court And The District Of Columbia Circuit Court Of Appeals Err By Refusing To Apply The Constructive Discharge Standard Set Forth In Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1978) Which Allows Relief When The Working Conditions Are Made So Intolerable That It Drives An Employee Into An "Involuntary Quit?"

Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981) held that constructive discharge, as previously defined, must be justified by the existence of certain "aggravating factors." id. at 1174. These aggravating factors include a

continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training, existing over a period of several years. id. at 1174.

The District Court quotes Clark as authority in its memorandum dated February 16, 1988. However, the District Court has made a palpable error in its application of case law. The District Court deemed the following to be the required standard in a constructive discharge claim:

> "To sustain a constructive discharge claim, plaintiff must show that her employer intentionally made her working conditions so intolerable that a reasonable person would be forced to resign. Clark v. Marsh, 665 F.2d 1168, 673 (D.C. Cir. 1981). Plaintiff has not sustained her burden of proof on this

point." Appendix C, p. 35-C.

However, the standard applied in Clark to a constructive discharge claim was dependent upon whether the employer deliberately made working conditions so intolerable as to drive the employee into an "involuntary quit." id. at 1173. The court stressed, however, that satisfaction of that standard, in turn, depends upon its application in the specific circumstances of each employment discrimination situation. id.

Since Clark was a case of first impression with the appellate court, a brief reference to the case law of other federal courts was required. Thus, the aforementioned quote utilized by the District Court was taken out of context from an opinion quoted from the fifth circuit.

Ms. Noble's facts mirror the aggravating factors found necessary to meet the Clark standard. She has been the subject of historic discrimination, she had made repeated futile attempts to obtain relief from that discrimination and has suffered humiliation and loss of prestige within her chosen career; thus surely constituting appropriate aggravating factors.

Moreover, Ms. Noble's supervisor, John Daniels, testified that he would have left his job had he been subject to occurrences similar to those of Ms. Noble. Appendix F, pp. 2-F Additionally, Ms. Noble's expert witness presented the view that it "would have been unreasonable to stay in that kind of hostile, disruptive, impaired work environment." Appendix G , pp. 1-G--2-G.

Ms. Noble contends the District Court's misapplication of the law has resulted in denial of her constructive discharge claim. Ms. Noble submits that if the appropriate standard were applied the record adequately supports a finding of constructive discharge. Ms. Noble further urges the court to award relief subsequent to her retirement that is consistent with 42 U.S.C. § 2000 5(g).

III. Did The District Court Err By Failing To Award Ms. Noble Attorney Fees Where She Satisfied The Requirement Under Title VII Of Alleging A Claim That Was Colorable Under The Civil Rights Laws?

The leading case in the District of Columbia Circuit Court which addresses attorneys fees is Commissioners Court of Medina County, Texas v. United States, 683 F.2d 435 (D.C. Cir. 1962) quoted from

Miller v. Staats, 706 F.2d 336 (D.C. Cir. 1983). Medina held that since attorney's fees are not designed merely to penalize defendants, but to encourage injured individuals to seek relief, a colorable claim under the Civil Rights laws, is all that is needed for attorney fee provisions.

Ms. Noble undeniably has a colorable claim. The fact that retaliation and upper management's tacit agreement thereto were found in her favor gives her claim legal basis. Thus, pursuant to Medina and 42 U.S.C. § 2000 e-5(k), Ms. Noble requests the appropriate attorney's fees.

Conclusion

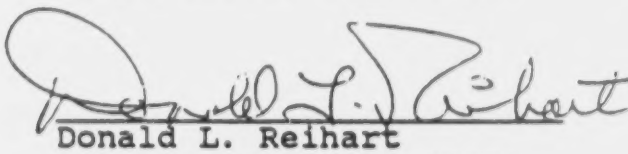
By denying Ms. Noble's full de novo review of EEOC's recommended decision, the United States District Court for the District of Columbia abused the legislative intent of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000 e-16) and denied Ms. Noble her Title VII right to a plenary judicial proceeding.

The District Court incorrectly held, "Ms. Noble got what she deserved." However, what Ms. Noble deserved was a full de novo review of the charges against DOE. It is submitted that failure to provide de novo review has resulted in denial of Ms. Noble's constructive discharge claim.

Under the circumstances, Ms. Noble has suffered emotional distress and severe economic set-back; thus,

presenting a cry for her entitled relief pursuant to 42 U.S.C. § 2000e-5(k) and attorneys fees pursuant to 42 U.S.C. § 2000e-5(k). The issues set forth herein represent issues which have been presented to the Court on prior occasion and present an ongoing conflict among the circuits. The application for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

EEOC's Recommended Decision

and

DOE's Acceptance

Dorothy L. Noble

vs.

John S. Herrington

Civil Action No. 85-1507

EEOC CASE NUMBERS: 033-082-X2017,
033-082-X2534

AGENCY CASE NUMBERS: 79 (30) HQ,
81 (23)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BALTIMORE DISTRICT OFFICE

WASHINGTON AREA OFFICE

DOROTHY L. NOBLE,	)	July 18, 1984
Complainant	)	
	)	EEOC Case Numbers:
v.	)	033-082-X2017
U.S. DEPT. OF ENERGY,	)	033-082-X2534
Agency	)	
	)	Agency Case
	)	Numbers:
	)	79(30)HQ,
	)	81(23)

RECOMMENDED DECISION

On July 7, 8, December 6 through 9, and 13 through 15, 1982, a hearing was held on these two consolidated employment discrimination complaints. With respect

to the first complaint, the Complainant, a former Publications Marketing Specialist, GS-301-13, had previously sought EEO counseling on October 25, 1979, alleging discrimination on the basis of sex (female) when the Agency assigned her duties not commensurate with her supervisory position, denied her assignments commensurate with her position and denied her assignments involving travel. The EEO Counselor failed to resolve the matter to Complainant's satisfaction, and Complainant filed her formal complaint on December 27, 1979, alleging not only sex discrimination but also reprisal for having contacted the EEO Counselor. An informal adjustment attempt was made on July 24, 1981, but was unsuccessful. Thereafter, the Agency issued its Notice

of Proposed Disposition dated August 21, 1981, finding no discrimination. This proposed disposition was unacceptable to Complainant, and on September 10, 1981, she requested a hearing. The Agency requested the appointment of an EEOC Complaints Examiner to conduct the hearing.

With respect to the second complaint, the Complainant had previously sought EEO counseling on March 18, 1980, alleging reprisal for her previous EEO complaint and discrimination on the basis of sex (female) when on March 10, 1980, Complainant received a Notice of Intent to withhold her within-grade increase. The EEO Counselor failed to resolve the matter to Complainant's satisfaction, and Complainant filed her formal complaint on October 5, 1981. By letter dated

December 29, 1981, the Agency issued its final decision rejecting the second complaint on the ground that the issue of her non-promotion was a matter not raised with the EEO Counselor.

By letter dated January 29, 1982, Complainant timely appealed this final agency decision to EEOC's Office of Review and Appeals (ORA). On September 10, 1982, ORA issued its decision reversing the Agency's decision and remanding the case to the Agency for further processing. By letter dated September 27, 1982, the Agency requested that the second complaint be consolidated with the first complaint for a hearing without a formal EEO investigation, to which the parties agreed. Volume 3 of Hearing Transcript at page 4.

David A. Fontanella and Christine

Krithades, attorneys, represented the Agency at the hearing. On July 7 and 8, 1982, Robert Ray Stone, an attorney, represented the Complainant. Mr. Stone subsequently withdrew from the proceeding and Theodore Polydoroff and Timothy C. Miller, attorneys, represented the Complainant thereafter. Twenty-four witnesses including Complainant testified at the hearing: William K. Coblentz (male), Chief, Imports Reporting Section, Energy Information Administration (EIA); Elizabeth Bowman (female), former Writer/Editor, GS-1082-12; Bernice R. Somers (female), former Technical Publications Specialist, GS-13, and Publications Manager, Printing and Dissemination Branch; Mary Hall (female), former Acting Chief of the Information Research Branch, GS-1412-13; Richard S.

Francis (male), former Technical Information Specialist or Publications and Marketing Specialist, GS-1412-11; Cynthia G. McLaughlin (female), former secretary for the Director of the Office of Energy Information Services; T. Wendell Butler (male), Deputy Director of the Office of Fuels Programs; Dorothy F. Weed (female), former Director of the National Energy Information Center (NEIC), GS-15; Sara S. Wilson (female), Chief of the Subscription Section, Documents Department, Government Printing Office; Elsie D. Wiegel (female), Graphics Coordinator, GS-12, NEIC, and formerly a Writer/Editor, GS-1082-12; Bobby Isaac (male), formerly a Writer/Editor in the EIA Office of Public Information; Katherine E. Cline (female), Research Analyst, GS-12, and from July

1981 to December 1981, Operations Research Analyst and State Program Coordinator, NEIC; Gwendolyn E. Riley (female), Supervisory Personnel Staffing and Employee Relations Specialist; William Murphy (male), in 1979, the Labor Relations Specialist responsible for servicing EIA; Sandra L. Wilson (female), Management Services Specialist; John E. Daniels (male), Director of NEIC; Neal Moerschell (male), Director of the Information Research Division, NEIC; Shelly G. Prosser-Ford (female), formerly Chief, Information Management Branch, NEIC, GS-13; Thomas P. McCarley (male), Writer/Editor, GS-1082-12; Nancy A. Nicoletti (female) Technical Publications Specialist, GS-1412-13, and the Publications Production Manager; Heidemarie A. Sanford (female), Energy

Information Specialist, Information Referral Division, NEIC; Patricia M. Jacobus (female), Writer/Editor, GS-1082-13 and Team Leader, Publications Services Division, NEIC; and William Lorn Harvey (male), Program Manager for the Plans Development Program, Office of Energy Contingency Planning. The Report of Investigation (I.R.), the Hearing Transcript (1 H.T. through 9 H.T.) have been made a part of the record. With respect to exhibits, 136 out of the 163 exhibits designated as Complainant's Exhibits (C.Ex.) introduced into evidence at the hearing have been made a part of the record. Forty-eight out of forty-nine exhibits designated as Hearing Exhibits (H.Ex.) have also been made a part of the record. The following exhibits were not made a part of the

record because either they were ruled inadmissible or they were withdrawn:

Inadmissible		Withdrawn
C.Ex	H.Ex.	C.Ex
27b	49	76
27C		77
68		81A
85A		123
104		139B
105		140A
141C		160
141D		161
141F		
141G		
142A		
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143A		
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143C		
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Issue

Was the Complainant retaliated against for her EEO activity and/or discriminated against on the basis of sex (female) when the Agency assigned her duties not commensurate with her supervisory position, when the Agency denied her

assignments commensurate with her position, and when the Agency denied her assignments involving travel, the effect of which was to deny a promotion to the GS-14 level, to deny her professional growth and awards, and to force her to retire in September 1981.

ANALYSIS AND FINDINGS

In order for the Complainant to prevail, the evidence of record must initially establish at least a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If a prima facie case is established, the burden shifts to the Agency to articulate a legitimate nondiscriminatory reason for the

challenged action. Burdine at 253-254; McDonnell Douglas at 802. The Complainant may then show that the reason articulated by the Agency is a mere pretext for discrimination. Burdine at 256; McDonnell Douglas at 804. The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant remains at all times with the Complainant. As noted by the Court, the factual circumstances vary in discrimination cases, and there are differences in the prima facie case applicable to differing factual situations.

Complainant can establish a prima facie case by showing: (1) she belongs to a group protected by Title VII and (2) she was entitled to a benefit (or advantage) but was denied the benefit,

whereas other similarly situated employees outside the protected group received the benefit or, in the alternative, that she was not entitled to the benefit, but that other similarly situated employees outside the protected group, who were similarly not entitled, were nonetheless granted the benefit (or advantage). Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

Sandra L. Wilson testified that from the summer of 1978 into 1979 she was Chief, Organization and Resources Management Branch, EIA, and the liaison between EIA management and the Agency's Personnel Office. 7 H.T. at 55. She also testified that in 1978 Mr. Daniels proposed a reorganization of the Energy

Information Clearinghouse Division into 3 branches: Printing and Distribution Branch; Marketing Branch; and Editing Branch. 7 H.T. at 58. She further testified that a management analyst from the Departmental Organization and Management Office vetoed the three-branch configuration and that the marketing branch was cut out because the division did not warrant three branches. 7 H.T. at 58, 94.

Mr. Daniels testified that in July or August 1978 he became the Director of the Office of Energy Information Service (OEIS) which at that time was greatly understaffed insofar as the allowed ceiling. 7 H.T. at 99. He also testified that the mission and functional statements for OEIS had not been fully authorized by Management Administration

and that the staff members did not have official position descriptions. 7 H.T. at 99. It is clear from a review of the record that not only were efforts being made to reorganize OEIS, but also to classify the positions at higher grade levels. Complainant even testified that there was an effort to update and restructure the position descriptions to coincide with an agencywide reorganization. 1 H.T. at 73.

Mr. Daniels testified that he proposed a three-branch structure but the Management and Administration people did not approve this structure, lowering the number of branches to two for each of the two divisions and telling him that he needed more than two people in a branch to have a branch and that they thought some of the functions could be

consolidated. 7 H.T. at 100-101; H.Ex. 5. He also testified that he had difficulty with the classifier in having certain positions classified at certain grade levels; the classifier did not buy any of his proposals on grade ladders for some positions, as well as the grade levels for some positions. 7 H.T. at 102-103.

Complainant raised the issue of a delay in her promotion from a GS-12 to GS-13 level as evidence of sex discrimination. Complainant testified that a December 19, 1978 memorandum to Mr. Daniels indicating her reassignment to Technical Information Specialist, GS-12, on December 17, 1978, evidences no attempt to promote her to the GS-13 grade level. 1 H.T. at 81; H.Ex. 3. However, I do not find Complainant's assertion

persuasive when viewed against other documentary evidence.

Complainant testified that Mr. Daniels asked her to write her own position description, which she did, incorporating what functions of her supervisor (Mr. Daugherty, a GS-1412-15) she was performing at that time, as Acting Director. She testified that Mr. Daugherty was on detail as early as July 1978 through October 1978. 2 H.T. at 270. She also testified that Mr. Daniels told her that the position description that she wrote sounded like a GS-15. H.T. at 77. In a memorandum dated January 2, 1979, Mr. Daniels informed Complainant and her supervisor, Mr. Daugherty, that the position description (PD) written by Complainant did not meet the classification standards for a GS-13.

H.Ex. 4. He also suggested in this January 2 memorandum that they review the classification standards for the 1312 series and the PD before he discussed the matter with the classifier. H.Ex. 4. In another memorandum dated January 23, 1979 to the classifier, Mr. Daniels specifically disagreed with the classification of Complainant's position at a GS-12 grade level. H.Ex. 5. When shown this January 23 document, Complainant testified incredibly that Mr. Daniels was covering up his actions; it was a subterfuge. 2 H.T. at 276-280. In support of her testimony, she relied on a January 265, 1979 memorandum from Gwen Johnson rebutting and clarifying some of the points raised in Mr. Daniel's January 23 memorandum. H.Ex. 6. However, a review of the document reveals, inter

alia, that Complainant's PD was revised by OEIS and was given directly to classification. The next sentence, "The revised PD never came back from OMS for processing," does not alter the fact that Complainant's PD was revised and then resubmitted to classification in an effort to have it approved at the GS-13 grade level.

I find that Mr. Daniels did make efforts to have Complainant's position upgraded to the GS-13 grade level and such efforts continued after Complainant was reassigned to a Technical Information Specialist position at the GS-12 grade level.

Complainant testified that she was promoted to the GS-13 grade level on May 19, 1979 and that she was a Publications and Marketing Specialist, GS-301-13 until

she left the Agency on September 25, 1981. 1 H.T. at 71, 62. A review of the record reveals that the branch chiefs, whether under the proposed and eventually disapproved three-branch configuration or the approved two-branch structure, were all women and they were all eventually promoted to the GS-13 grade level. H.Ex. 1, 35. I find that Complainant has failed to show that she was treated differently from other similarly situated employees outside her protected group, i.e., she has not shown that there were any male employees at the GS-12 grade level who were promoted to the GS-13 grade level at or around the time of her promotion. H.Ex. 35. A review of OEIS/NEIC promotions for the period August 1,1978 to October 4, 1981 reveals that of the 21 employees

promoted, five were males and only one of those five involved a promotion from the GS-301-12 to the GS-301-13 and that promotion occurred on April 6, 1980, almost one year after Complainant's promotion. The other four promotions involved lower graded employees. H.Ex. 35.

Complainant also testified, in effect, that she was entitled to a promotion and that it was not timely given. 3 H.T. at 63-65. Complainant specifically stated that "if the classifier would move fast, it could have been done in September." 3 H.T. at 63-65. However, Complainant was not in a career ladder position and for her to be promoted to the GS-13 grade level, she either had to apply under a vacancy announcement or have her position upgraded through the classification

process, the latter of which was done. Moreover, Complainant had adduced no evidence that this delay was discriminatorily motivated or that Mr. Daniels was in some way responsible for the delay. I find the evidence to the contrary, i.e., efforts were made to promote Complainant. In fact, Complainant even testified that she did write another position description in January 1979, that it was classified March 27, 1979 and she was promoted on May 19, 1979. 3 H.T. at 77; C.Ex. 2.

In a promotion or hiring case the Complainant may establish a prima facie case of discrimination by showing: (1) that the Complainant is a member of a group protected from discrimination; (2) that the Complainant applied for and was qualified for the position at issue; and

(3) that the Complainant was rejected under circumstances which give rise to an inference of unlawful discrimination, e.g., the Agency continued to seek applicants or filled the position with a person who was not a member of Complainant's protected group. Id. at 802; Burdine at 256.

It is not disputed that Mr. Daugherty, a GS-15, retired on November 9, 1979. 3 H.T. at 153-154. On March 18, 1980, his vacant position was advertised as an Energy Information Clearinghouse Manager at the GS-301-14 grade level under Vacancy Announcement Number 80-544 with a closing date of April 8, 1980 for the receipt of applications. H.Ex. 10. It is not disputed that Complainant applied for this GS-14 grade level position. H.Ex. 26. The vacancy was not filled and

the announcement was canceled on or about April 17, 1980. H.Ex. 26.

Complainant contended that this vacancy announcement was withdrawn to avoid selecting her. H.T. at 131, 138. She also contended that the subsequent reassignment of Mr. John Weiner to this position was done to avoid selecting her. The Agency offered the testimony of Ms. Gwendolyn E. Riley to explain the circumstances surrounding the cancellation of the vacancy announcement and the reassignment of Mr. Wiener. Ms. Riley credibly testified that this announcement was canceled because of a hiring freeze. She testified that her office received guidance from the Assistant Secretary for Management and Administration in the form of a memorandum dated April 4, 1980. 6 H.T.

at 10-11; H.Ex,. 27. She further testified that this memorandum explained the hiring limitations, i.e., management could only fill one out of every two vacancies. 6 H.T. at 10-11; H.Ex. 27. A review of the April 4 memorandum reveals the Agency's guidelines which included, inter alia, that "vacancies in existence before March 1, 1980, do not qualify as positions vacated on or after March 1, 1980; therefore, each such vacancy may be filled only when two more positions are vacated." H.Ex. 27.

Ms. Riley also testified that Mr. Wiener was laterally reassigned to the position of GS-14 Energy Information Clearinghouse Manager in March 1981 and that Mr. Wiener did not compete for the position because competitive procedures were not applicable to lateral

reassignments. 6 H.T. at 13-14. She also testified that Mr. Wiener's prior job was scheduled for abolishment and he was given priority consideration for another job at the same GS-14 grade level. 6 H.T. at 37. In support of Ms. Riley's testimony, a review of the Agency's merit promotion plan, dated August 5, 1980, reveals that "a reassignment to a position having promotion potential no higher than that of the last position held" is excepted from competitive merit promotion procedures. H.Ex. 38. With respect to Mr. Wiener's reassignment, Mr. Daniels testified that he neither was asked about nor had any input into the transfer of Mr. Wiener; that essentially as he remembers, Mr. Wiener was put into the position under him without having been

consulted. 7 H.T. at 120-121.

In corroboration, Ms. Sandra L. Wilson testified that Mr. Wiener was laterally reassigned because he was already at the GS-14 grade level elsewhere in EIA and he was in a position that was subject to downgrading. 7 H.T. at 75-76. She also testified that it was a rather shaky time then for senior people and the office in which he worked under close scrutiny regarding grade levels and the number of positions. 7 H.T. at 75.

In her complaint, Complainant asserted, among other things, the following:

> In order to effectively discharge my duties, I feel I must have clear authority, resources, communication channels, and improvement/training opportunities.
>
> In actuality, Daniels reserves management of the marketing program for himself. What authority I may have is diluted and clouded by the

> publications manager's position and the absence of clearly defined roles for the contractors and consultants. Planning has been dispersed and fragmented into "collegial" efforts, and assigned to others, including contractors. Determination of method and approach has been 90% under Daniel's control.

I.R., Tab D, Attachment (Att.) 1.

Complainant alleged not only that Mr. Daniels and Mr. Daugherty did not permit her to perform the higher functions of her position description but they had also reserved these duties for themselves. However, I do not find any merit to the allegation when viewed against the fact that both Mr. Daniels, a GS-15, and Mr. Daugherty, a GS-15, were both Complainant's supervisors. By virtue of their positions, they were both performing and were responsible for many of the same functions that Complainant performed.

The collegial efforts that Complainant described not only in her complaint but also in her testimony were not limited to Complainant's duties, but applied to all efforts in OEIS. Moreover, Complainant's reference to the publication manager's position diluting and clouding what authority she may have had is notable by its failure to identify the publications manager by name. The publications manager was Bernice R. Somers, a female, who was hired on November 19, 1979 at the GS-13 level and who testified that a collegial environment existed in the office. 2 H.T. at 284-286.

Complainant alleged that she was admonished by supervisors in the presence of male coworkers, while male coworkers were not similarly treated. I.R., Tab B, Att. 1. Complainant related several

incidents in which she was admonished in front of lower-graded males. However, most of the witnesses testified either that Mr. Daniels had admonished them in front of others for not completing projects or meeting deadlines on assignments or that Mr. Daniels treated Complainant more leniently than others with respect to completing assignments on time. 2 H.T. at 288-289, 299 (Somers); 2 H.T. at 405-406, 424 (Hall); 5 H.T. at 63-64, 74-76 (Weed); 5 H.T. at 201-202, 205 (Cline); 7 H.T. at 141-143, 150-154, 162 (Moreschell); 8 H.T. at 95 (Francis); 8 H.T. at 102-105, 111 (Ford); 8 H.T. at 197 (McCarley); 9 H.T. at 25 (Nicoletti); 9 H.T. at 41-44 (Sanford); 9 H.T. at 72, 97 (Jacobus). I find that Complainant has failed to show that with respect to admonishments she was treated differently

from her male coworkers. On the contrary, the evidence of record supports a finding that with respect to admonishing an employee in front of coworkers, Mr. Daniels reacted equally whether the employee was male or female.

Complainant alleged that she was discriminated against on the basis of her sex when she was denied assignments involving travel, and denied supervisory training. However, a review of the documentary evidence on the supervisory training and travel does not support a finding of sex discrimination. H.Ex. 32, 47. With respect to supervisory training, there was none given in 1979, so Complainant was not treated any differently than the other employees who were entitled to supervisory training. In 1980, Complainant along with Mr.

Moerschell, a GS-15, Ms. Prosser-Ford, a GS-13, and Ms. Nicoletti, A GS-13, received 12 hours of Performance Standards Training; Ms. Jacobus, A GS-13, received 8 hours of this training. In addition, Ms. Jacobus received 40 hours of training in Effective Supervision Seminar. H.Ex. 32. This distribution of the training hardly demonstrates a discriminatory animus on the basis of sex. Moreover, Ms. Sandra Wilson credibly testified that in 1980 Mr. Daniels nominated Complainant for two of the four courses and that he had no control over the number of slots or the amount of money allocated for training. 7 H.T. at 65; H.Ex. 33.

In 1981, only two supervisors received training: Ms. Prosser-Ford and Mr. McKay received 40 hours of Personnel Policies

and Procedures. H. Ex. 32. Once again, the evidence does not support a finding that Mr. Daniels discriminated on the basis of sex when viewed against Ms. Wilson's testimony that her office made the selections for training based on which employee was in a supervisory position for the longest period of time who had not gained the 80 hours of supervisory training in accordance with Office of Personnel Management's procedures. 7 H.T. at 89-90.

With respect to travel, Complainant testified that she was not afforded the opportunity to travel when the needs of the job demanded it and that males were traveling in connection with responsibilities that should have come under her domain. 6 H.T. at 51, 55, 57. However, I do not find Complainant's

testimony credible on this point. She testified that there were projects which required travel such as the training program and which were projects that were removed from her. 6 H.T. at 57. I do not find Complainant credible because the training program was never assigned to her. A review of the record reveals that from its inception, the training program was Mr. McKay's responsibility. It is clear from their testimony that Complainant and Mr. Daniels had a different view of what marketing was. Complainant considered training part of marketing and Mr. Daniels did not. This difference, however, is in no way the basis for sex discrimination, but merely a difference of opinion. Moreover, a review of the travel does not support Complainant's allegation that males were

singled out for travel at a greater rate than females. H.Ex. 47.

Complainant may establish a prima facie case of reprisal or retaliation by showing: (1) that the Complainant engaged in protected activity; (2) that the Agency was aware of the protected activity; (3) that the Complainant was subsequently adversely affected by an action of the Agency; and (4) that the action in question followed the protected activity within such a period of time that a retaliatory motivation may be inferred. Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976), aff'd 545 F.2d 222 (1st Cir. 1976).

It is not disputed that the Complainant contacted an EEO Counselor on October 25, 1979. Mr. Daniels testified

that he was contacted by the EEO Counselor the Friday after Thanksgiving Day, November 27, 1979, and that he found out about the EEO complaint filed by Complainant in January 1980. 7 H.T. at 111-112.

In an effort to show retaliation at an earlier date, Complainant testified that on November 7, 1979 she told Mr. Daniels that she had contacted an EEO Counselor and Mr. Daniels threatened her. 3 H.T,. at 143. In her affidavit Complainant attested that this discussion took place on November 7, 1979. I.R., Tab B, Att. 1, page 20. On the ninth day of the hearing and having heard the testimony of all the witnesses, Complainant in rebuttal testified as to the circumstances of her reporting to Mr. Daniels in which she stated for the first

time that this discussion occurred on November 2, 1979. 9 H.T. at 187, 252-253, 255. After hearing Complainant's version, I can not give credence to her testimony that such a discussion even took place. However, this finding does not alter the fact that Mr. Daniels knew about Complainant's EEO counseling activity as of November 27, 1979. It is not disputed that the formal complaint was filed on December 27, 1979 and was not accepted by the Agency until March 14, 1980. I.R., Tab D.

It is not disputed that several informal meetings took place in January 1980 between John Daniels, Bernice Somers, Neal Moerschell, Lincoln Moses, Eugene Odom and Armin Behr (the EEO Specialist) in an effort to resolve the complaint. In his testimony, Mr. Daniels

testified that he did not recall giving a copy of Complainant's formal complaint to Ms. Somers and he doubted that he did since they were both at the same meeting. However, in his affidavit, Mr. Daniels attested that he made the complaint available to Ms. Somers and Mr. Moerschell. I.R., Tab B, Att. 2. Moreover, in his affidavit, Mr. McKay attested that he, as Mr. Daniels' Special Assistant, was handed the file and asked to make one copy and give it to Mr. Moerschell. I.R., Tab B, Att. 7.

Ms. Somers testified that at the January 1980 meeting she was not told of the confidential nature of the EEO copmplaint, that Complainant's complaint was shown to her during the closed meeting and that when she left the meeting she told Mr. McKay that

Complainant had filed a complaint against Mr. Daniels. 2 H.T. at 321-322.

It is clear from these circumstances that although Complainant's first-and second-line supervisors were attempting to resolve the complaint, they are responsible for making known the complaint to Complainant's coworkers prior to the acceptance of the complaint. Complainant testified that on January 17, 1979, she found an open letter to Mr. Daniels signed by most of her coworkers. 4H.T. at 11-12; H.Ex. 42. In this open letter the signers acknowledged that they wee aware of Complainant's complaint of sex discrimination and stated not only their support for Mr. Daniels, but also commented on the complaint as follows; "Should these entirely untruthful charges not be either challenged by the OEIS

management officers or simply dropped by (Complainant) it is the view of the undersigned that office morale and productivity will suffer drastically." C.Ex. 42.

Mr. Francis testified that Mr. McKay, Ms. Prosser-Ford and maybe Ms. Jane Sanchez brought the pledge around for signatures. 8 H.T. at 118-121. It is clear from these facts that Ms. Somers' comment to Mr. McKay led Mr. McKay on a campaign to interfere with Complainant's processing of her complaint. As the Special Assistant to Mr. Daniels, he was in a position to influence those supervisors, as well as the employees, that were in OEIS.

In his affidavit, Mr. Daniels attested that he was aware of the petition, that after it was circulated, Complainant told

him that "tricks" were being played on her by some of the staff. I.R. Tab B, Att. 2, page 5. Mr. Daniels further attested that "I have been vaguely aware that some employees were alleged to be provoking (Complainant). I investigated and told (Complainant) to call the proper authorities (Security)." I.R., Tab B, Att. 2, page 6. Although he stated that employees he questioned denied any incidents, he did state that he observed that someone did take Complainant's nameplate from her desk and place it on the "xerox" room door and that he returned it to her desk. He further stated that the pranks did cease, then resumed in May or June 1980 at which time he instructed all division and branch chiefs that he wanted it stopped.

During this May-June 1980 period,

Messrs. Francis and McCarley wrote a memorandum dated June 6, 1980 to Complainant requesting assignments from her or they would request reassignment. H.Ex. 16. A review of the record also reflects that the EEO investigation was conducted, in part, between December 1, 1980 and February 8, 1981. During that period of time, Ms. Prosser-Ford and Messrs. McCarley and Francis gave affidavits, all three of which were signed on December 10, 1980. Shortly thereafter, these same people, rather than file another pledge, filed grievances against Complainant. On January 6, 1981, Mr. McCarley filed a grievance with his supervisor Ms. Jacobus, that Complainant had failed to give him his performance standards. H.Ex. 25. Mr. Francis similarly filed a

grievance on January 7, 1981 concerning, among other things, his performance standards. H.Ex. 24.

Although I find the June 6, 1980 memorandum and the two grievances to be legitimate in view of Complainant's failure to perform her responsibilities, what follows is another interference with the EEO process. On January 22, 1981, Messrs. McKay, McCarley, Francis, Ms. Jane Sanchez and Ms. Heidimarie Sanford filed a one-hundred, eighty-page grievance against Complainant in which they made allegations of and attempted to document Complainant's poor performance. C.Ex. 81. During this time Mr. McKay was no longer the Special Assistant to Mr. Daniels but a GS-301-13 supervisor. What makes this scenario even more peculiar is the fact that these individuals have

documentation that, the parties do not dispute, was never issued to the Complainant, i.e., Mr. Daniels' November 19, 1979 letter of warning to Complainant for poor performance. H.Ex. 23; C.Ex. 81, pages 96-98. If Mr. Daniels did not make this letter available to the grievants, then Mr. McKay, in his former capacity as Special Assistant, obtained a copy of the document. Once Mr. Daniels and other management became aware of this grievance, they processed it. I find this to be an abuse of the grievance process and interference with the further processing of Complainant's EEO complaint. As Mr. William Murphy testified, at the meeting between Mr. Daniels and the group of grievants, Mr. Daniels played the benevolent benefactor, commiserating with the employees,

agreeing with their position in the sense that he had played favorites in this case and allowed Complainant to get away with a lot of things the other employees were not getting away with, and that he had not met his responsibilities. 7 H.T. at 29-30.

I find that the actions of Complainant's coworkers were done in an effort not only to interfere with the processing of Complainant's complaint but also to intimidate her into dropping it. I find that management was aware of these coworkers' actions, if not before the incidents, the lack of corrective action after the incidents occurred shows management's tacit approval of the coworkers' actions. The effect of the coworkers' actions was not only to deprive Complainant of her right to have

her complaint processed free from restraint, interference or coercion as provided for in EEOC Regulation 29 C.F.R. 1613.261, but also to create a hostile working environment.

Complainant also alleged that the effect of these actions was to force her to retire in September 1981. In essence, Complainant claimed that she was constructively discharged.

Two tests have developed among the courts that have considered constructive discharge claims. Under the more conservative test, an employee is constructively discharged when the employer deliberately renders the employee's working conditions so intolerable as to force him to resign from his position. Muller v. United States Steel Corp., 509 F.2d 929 (10th

Cir. 1975), cert. denied, 423 U.S. 825 (1975). The more liberal standard requires the employee to show that his employer deliberately made working conditions so intolerable that a reasonable person would have been forced to resign. Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981). The requisite intent, in the majority view, involves the deliberate creation of intolerable conditions or purposeful discrimination, rather than an intent to get rid of the Complainant. See, Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61, 65 (5th Cir. 1980) (plaintiff need not show purpose to compel resignation but must show aggrevating circumstances); Clark v. Marsh, supra, at 1173-74 & n.5 (adopting Bourque standard). But see, Muller,

supra, at 929 (plaintiff must show a deliberate effort to make things difficult so as to bring about his separation).

The evidence of record does establish that "tricks" were played on Complainant in January 1980 and May-June 1980, that a pledge was circulated in January 1980 and that a group grievance was filed in January 1981. However, other than Complainant's general allegation that everyone was taunting and teasing her and making derogatory remarks, the record is devoid of any evidence and Complainant has adduced none to substantiate her allegation of an intolerable environment. 5 H.T. at 32-39.

Consequently, I do not find that Complainant has shown that her conditions were so intolerable or that such

aggravating circumstances existed that she was compelled to resign or even that a reasonable person would have been forced to resign.

With respect to the allegations of sex discrimination, while other matters appearing in the record were considered by me, they played no part in the recommended decision which follows, because they could not be adequately established as facts, were irrelevant to the issues, lack probative value or Complainant lacked credibility.

I find that Complainant has failed to sustain her ultimate burden of proving sex discrimination by a preponderance of the evidence. With respect to her allegation of reprisal, I find that the Agency retaliated against Complainant.

RECOMMENDED DECISION

I recommend a finding of no discrimination and a finding a retaliation.

RECOMMENDED CORRECTIVE ACTION

Within the framework of equitable remedial action as contemplated by Congress, the Complainant should be made

whole for the injury she has suffered. In a case such as this, where the retaliation does not result in a personnel action but instead takes the form of harassment by coworkers and acquiescence to this behavior by supervisors, the remedy which would make the aggrieved whole is a recommendation that such harassing behavior cease. However, as the Complainant is no longer employed by the Agency, such a recommended remedy is moot. While there is no remedy available under Title VII which can now make the Complainant whole for her injury, I can and do recommend that the Agency educate those employees who harassed the Complainant on their responsibility not to abuse either the grievance/arbitration machinery or the employment discrimination process.

I also recommend that, consistent with my finding of retaliation, attorney's fees be awarded.

NOTICE

Pursuant to Equal Employment Opportunity Commission regulations, 29 C.F.R. 1613.220)(d), the Examiner's recommended decision finding discrimination and the corrective action recommended herein shall become the final decision binding on the Agency if the Agency has not issued a final decision adopting, rejecting, or modifying the recommended decision by the later of the following two dates: (1) within 30 calendar days after the date the Agency received the recommended decision; (2) or within 180 days of the date on which the complaint

was filed. In such event, the Agency shall notify the Complainant that pursuant to 29 C.F.R. 1613.220(d) the Examiner's recommended decision is the Agency's final decision and furnish to Complainant a copy of the findings, analysis, and recommended decision of the Examiner under 1613.218(g) and a copy of the hearing record. The Agency shall notify the Complainant in writing of Complainant's right to appeal to the Commission and the time limits applicable thereto. The Agency shall also notify Complainant of Complainant's right to file a civil action in federal district court and of the right of an unrepresented plaintiff to request the court to appoint counsel for the plaintiff. Hilliard v. Volcker, No. 77-1700 (D.C. Cir. Feb. 3, 1981).

signed Michael Baldonado

Michael Baldonado

Attorney Examiner

Reviewed by:

signed Dorothy E. Mead

Dorothy E. Mead

District Director

Baltimore District Office

Department of Energy

Washington, DC 20585

Jul 25 1984

NOTICE OF FINAL DECISION OF THE DEPARTMENT

CERTIFIED

Ms. Dorothy Noble

1400 S. Joyce Street

Arlington, VA 22202

Dear Ms. Noble:

The purpose of this notice is to inform you of the Department of Energy's (DOE) final decision in your formal complaints of discrimination filed on December 27, 1979, and October 5, 1981, and your appeal rights if you are dissatisfied with this decision.

Enclosed for your information is a copy of the Equal Employment Opportunity Commission's (EEOC) recommended decision

dated July 18, 1984, and a copy of the verbatim transcript of the hearing held on July 7, 8, December 6 through 9, and 13 through 15, 1982.

I hereby adopt as the final decision of DOE the EEOC's recommended finding of no discrimination with respect to the allegations of sex discrimination and a finding of retaliation with respect to the allegation of reprisal.

The Department's final decision is to award you attorney's fees, consistent with the finding of retaliation. The amount of attorney's fees must be documented and your request submitted in writing within 20 calendar days of receipt of the final decision. Further, the Department will educate those employees who harassed you on their responsibility not to abuse either the

grievance/arbitration machinery or the employment discrimination process. If you are dissatisfied with this final decision, you have the following appeal rights:

a. Except as provided in paragraph b below, you may file a notice of appeal at any time up to 20 calendar days after receipt of DOE's notice of final decision on your complaints. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant's agency within 30 calendar days of filing the notice of appeal.

b. The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon

written showing by you that you were not notified of the prescribed time limit and were not otherwise aware of it, or that circumstances beyond your control prevented the filing of a notice of appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the appeal.

- If you elect to appeal to EEOC, you may file a civil action in a U.S. District Court within 30 calendar days after receipt of EEOC's final decision.
- A civil action also may be filed any time after 180 calendar days of the date of initial appeal of EEOC if a final decision has not

been rendered.

- Should you elect to file a civil action and are unrepresented at the time of your appeal, you have a right to request the court to appoint counsel.
- Although there are not specific time limits for filing a civil action in age discrimination cases, it is recommended that should a complainant wish to file a civil action, he or she be advised to do so as expeditiously as possible.

Sincerely,

(signed) Nathaniel H. Pierson

Nathaniel H. Pierson

Director

Office of Equal Opportunity

Enclosures (2)

cc:

Jerry Keith

David Fontanella

Theodore Polydoroff

Department of Energy

Washington, D.C. 20585

Apr 5 1985

Ms. Dorothy Noble

c/o Polydoroff and Miller

11249 Fern Street

Wheaton, MD 20902

Re: Dorothy Noble v. Department of Energy - Attorney Fees

Dear Ms. Noble:

This is your notice of the final decision of the agency on the attorney fees and costs in your complaint of discrimination.

In the case of Dorothy Noble v. Department of Energy, it is the decision of the Department of Energy that attorney fees will be paid as follows:

Gary Simpson	$471.25

Kalijarvi Law Firm	302.07
Polydoroff and Miller	000.00
Dorothy Noble	000.00
Total Attorney fees and Costs	$773.32

I shall direct the Department's Controller's office to satisfy the Department's obligation for your attorney fees, as stated herein.

Enclosed is the analysis by which we reached this decision.

If you are dissatisfied with this decision, you have the following appeal rights:

- You may appeal to the Equal Employment Opportunity Commission (EEOC) within 20 calendar days after receipt of the decision. Your appeal should be addressed to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street

NW., Washington, DC 20506. The appeal and any representations in support thereof must be submitted in duplicate. If you appeal to EEOC (hereinafter referred to as Commission), you should know the following:

a. Except as provided in paragraph b below, you may file a notice of appeal at any time up to 20 calendar days after receipt of the DOE notice of final decision on your complaint. Any statement or brief in support of the appeal must be submitted to the Commission and to the Department of Energy within 30 days of filing the notice of appeal.

b. The 20-day time limit within which a notice of appeal must be

filed will not be extended by the Commission, unless, based upon a written showing by you that you were not notified of the prescribed time limit and were not otherwise aware of it, or that circumstances beyond your control prevented the filing of a notice of appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the appeal.

- In lieu of an appeal to EEOC, you may file a civil action in an appropriate U.S. District Court within 30 calendar days of receipt of the decision.
- If you elect to appeal to EEOC, you may file a civil action in a U.S. District Court within 30 calendar days

after receipt of EEOC's final decision.

- A civil action also may be filed any time after 180 calendar days of the date of initial appeal to EEOC if a final decision has not been rendered.
- Should you elect to file a civil action and are unrepresented at the time of your appeal, you have a right to request the court to appoint counsel.

Sincerely,

(signed) Nathaniel H. Pierson

Nathaniel H. Pierson

Director

Office of Equal Opportunity

Enclosure

CC:

Gary Simpson

June Kalijarvi

Dorothy Noble v. Department of Energy: Attorney Fees

The Department's decision in this case awarded Complainant attorney fees "consistent with the finding of retaliation." The decision stated further that the amount of attorney fees must be documented.

Subsequent to the decision the Department received claims totalling $83,967.20 in relation to this case as follows:

1) Gary Simpson

Attorney Fees	Expenses	Total
$ 471.25		$471.25

2) June Kalijarvi law firm

Attorney Fees	Expenses	Total
$ 1,587.92	$30.55	$1,618.47

3) Polydoroff and Miller

Attorney Fees	Expenses	Total
$60,000.00	$515.28	$60,515.28

4) Dorothy Noble

	Other	
$21,362.20		$21,362.20
+ interest		+ interest

TOTAL

Attorney Fees	Expenses	Total
$83,421.37	$545.83	$83,967.00

Each of these claims is discussed separately herein.

In making determinations as to the allowability of attorney fees and costs, it is first necessary to assess the reasonableness of the hours and rates. This is not, however, the only step. In it's decision in Hensley v. Eckerhart 103 S.CT. 1933 (1983), the Supreme Court stated, with regard to attorney fees,

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain

other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

When a complainant has prevailed on some part but not all of her complaint, those

hours not attributable to the successful claim are to be excluded from the award of fees. Accordingly, the submissions are treated as follows:

1. Gary Simpson: Mr. Simpson billed DOE for $471.25. He billed 6.8 hours for himself at $75 per hour and 1.7 hours for his associate at $50 per hour. The hourly rate is reasonable and consistent with the finding of retaliation. Accordingly, the full amount of $471.25 is allowable.
2. Kalijarvi Firm: The form has billed DOE for $1,587.92 in attorney fees, and $30.55 in expenses. Kalijarvi has billed 5.59 hours at $110 per hour. The federal government normally will not pay more than $75 per hour for attorney fees. An examination of her time records reveals that only one

hour of her time is attributable to the case.

Chuzi has billed DOE for .333 of an hour for his services as a lawyer and 18.524 hours at $45 per hour for his services as law clerk. Chuzi was admitted to the Bar in December 1980. The federal government pays law clerks at $25 per hour. The one-third he billed as a lawyer is attributable to the case. However, only 3.66 of his law clerk time is attributable to the case. In view of his recent admission to the Bar, his lawyer time should be reimbursed at $50 per hour.

Shea billed DOE for .133 of an hour at $90 per hour. This is attributable to the case, but the rate should be $50 per hour because she also was recently admitted to the Bar.

The firm also billed paralegal time of 3.9 hours at $25 per hour. This is an allowable sum. Of the $30.55 in expenses, only $14.80 for xeroxing is allowable.

Kalijarvi: 1 hour x $75 per hour	=	$75.00
Chuzi: .333 hour x $50 per hour	=	$16.50
3.66 hours x $25 per hour	=	$91.62
Shea: .133 hours x $50 per hour	=	$ 6.65
Paralegal: 3.9 hours x $25 per hour	=	$97.50
Expenses: xeroxing	=	$14.80
		$302.07

Consistent with the finding of retaliation, the amount of $302.07 is allowable to the Kalijarvi law firm.

3) Polydoroff and Miller: This firm billed DOE $60,000 for 600 hours at $100 per hour. Polydoroff billed 299.5 hours, and Miller billed 300 hours.

Analysis of the time records shows that the firm used two attorneys for numerous office conferences with Ms. Noble. This is not customary in Washington practice. Accordingly, 52.5 hours have been cut from Polydoroff's time and 83 hours from Miller's time. DOE would pay for the use of two attorneys at the hearing. Thus, the maximum hours allowable to Polydoroff is 247 and to Miller, 217, for a grand total of 464 hours for the firm.

The firm billed DOE at the hourly rate of $100. Attached is a copy of a

letter from the firm in which they indicate their billing arrangement with Ms. Noble. In view of the fact that the firm agreed to bill Ms. Noble at $50 per hour, that sum would be allowable, and not $100 per hour.

The firm billed DOE for expenses in the amount of $515.28. The only expenses allowable are xeroxing costs of $74.20. Thus, the assessment of hours and rate yields the following adjustment in the claim of this firm.

Attorney fees: 464 hours		
x $50 per hour	=	$23,200.00
Expenses: Xeroxing	=	74.20
		$23,274.20

This is the amount to which Polydoroff and Miller would be entitled had complainant prevailed on all aspects of her case. The fact remains,

however, that she did not.

In her sex discrimination complaint of December 27, 1979, Complainant alleged that her superior interfered with her job performance by withholding resources: eroding her substantive responsibilities as well as her supervisory authority; that because of sex discrimination she was denied travel commensurate with her duties, that she had been detailed to positions under the supervision of employees of lesser grade, that she was excluded from meetings crucial to her work, and that she was consistently reprimanded in a manner disparate from male employees.

Complainant also alleged that her superiors harassed her subsequent to EEO counseling.

The remedies sought in connection with this complaint were promotion to GS-14 retroactive to April 1980 with backpay, and a transfer of position. Both the Agency EEO officer and the EEOC complaints examiner found that all of the allegations in this complaint were nonpersuasive in that they were lacking in probative value or in credibility; both found that Complainant failed to carry the burden of proof necessary to prevail on either a charge os sex discrimination or reprisal.

In her reprisal complaint, filed on October 6, 1981, Complainant alleged that "[S]ince my discrimination complaint of December 27, 1979, and subsequent to that complaint, DOE management has subjected me to

conscious, willful, coordinated, continuous and deliberate, if not malicious acts of reprisal and continuing sex discrimination of such frequency, intensity, and persistence as to subvert my program, discredit me professionally, demean my character, and thwart my career progress." The complaint cited numerous examples of the alleged continuous acts of reprisal, including "DOE's handling of grievances against me." Complainant alleged that these acts of reprisal caused her to leave.

For remedy, she repeats her request for promotion to the GS-14 retroactive to April 1980 with backpay, with an appointment to Director, Energy Information Administration Clearing House, or equivalent. Complainant

also requested that management take steps to assure staff awareness of their obligations regarding reprisal and that these requirements be enforced. Complainant also sought removal of all negative documents arising from this complaint from her personnel file, and reimbursement for costs incurred with interest.

This complaint was rejected by DOE as identical to the initial complaint except for one issue. The issue which was not identical was rejected based on Complainant's failure to seek counseling. Complainant appealed the rejection to EEOC. EEOC reversed DOE's decision and recommended that the complaint be consolidated with the earlier complaint, which was, at that tine awaiting EEOC hearing. DOE

accepted this recommendation. The consolidation meant that DOE conducted no investigation of the October 6, 1981 complaint; rather allegations of this complaint were to be investigated during the hearing.

Among the numerous examples of continuous reprisal cited by Complainant, the complaints examiner found that only the following specific incidents constituted reprisal.

- The involvement of the Special Assistant to the Director of National Energy Information Center in circulating pledge of support for management as opposed to Complainant.
- The filing of a group grievance against complainant and management's commiseration with

these employees during the meeting on the grievance.

The complaints examiner found that these actions deprived Complainant of her right "to have her complaint processed free form restraint, interference or coercion as provided for in EEOC Regulation 29 CFR 1613.261..."

It was found that the facts failed to support her other allegations of reprisal. Further, the evidence did not support a finding that retaliation created a work environment so intolerable as to force Complainant's resignation.

Regarding corrective action the complaints examiner stated, "[w]hile

there is no remedy[1] under Title VII which can now make the Complainant whole for her injury, I can and do recommend that the Agency educate those employees who harassed the Complainant on their responsibility not to abuse either the grievance/ arbitration machinery or the employment discrimination process." He also recommended that attorney fees consistent with the finding of retaliation be awarded. DOE adopted this decision.

Polydoroff and Miller have submitted an affidavit attesting to the fact

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[1] It should be noted that even at the time she filed her second complaint, no remedy was available to Complainant on the allegations on which she prevailed, since she filed the complaint of reprisal after she retired.

that their hours cannot be apportioned among parts of the complaint on which Complainant prevailed and the parts on which Complainant did not prevail.

The Supreme Court noted the likelihood that some cases involved a "common core of facts or will be based on related legal theories." Hensley v. Eckerhart, supra. Such a case cannot be treated as a "series of discrete claims." Rather, the focus, under these circumstances, must be "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended..." Hensley v Eckerhart, supra. The fact that a complainant succeeds in identifying an unlawful practice or condition - as complainant did in this instance - is not, of itself, an

automatic justification for hours expended. Rather, the relationship between the success achieved and the hours expended must be examined.

As is shown above, the extent to which Complainant prevailed on the allegations is extremely limited. The complaints examiner found merit in only two specific incidents that Complainant had cited. He did not find a pattern of continuous reprisal and he did not find that Complainant had be constructively discharged. Complainant prevailed on two allegations for which the only relief possible, i.e., the cessation of the practice, had occurred months before she even filed her complaint.

Given the fact that the remedy in the instant case afforded complainant no

relief, and given the sworn statement of Polydoroff and Miller that their hours cannot be apportioned, it is the decision of the Department of Energy to deny full the claim submitted by Polydoroff and Miller.

4) Dorothy Noble: Ms. Noble billed DOE for $21,362.10 plus interest.

She incurred expenses in the amount of $562.20. The decision of DOE awards attorney fees, consistent with the finding of retaliation. It does not award costs unless they were incurred as part of the attorney fees. Accordingly this amount is denied.

She billed DOE for $10,500.00 paid to a consultant. There is no statutory or regulatory provision for the payment of consultation fees. Therefore, this expense is not

allowable.

She has billed DOE for $4,400.00 she paid to Robert Ray Stone, her previous attorney whom she discharged. There is no supporting documentation, time records or affidavit from Mr. Stone as required by regulation. This sum is not allowable. Mr. Stone has sued her for unpaid legal feed in the amount of $5,900.00 plus interest. Ms. Noble has billed DOE for this sum. There is no supporting documentation and this sum is not allowable.

Accordingly, it is the decision of DOE to deny in full the claim submitted by Dorothy Noble.

Decision

In the case of Dorothy Noble v. Department of Energy, it is the decision of the Department of Energy that attorney

fees will be paid as follows:

Gary Simpson	$471.25
Kalijarvi Law Firm	302.07
Polydoroff and Miller	000.00
Dorothy Noble	000.00
Total Attorney fees and Costs	$773.32

APPENDIX B

January 17, 1986 District Court

Denial of Attorney Fees

Dorothy L. Noble

vs.

John S. Herrington

Civil Action No. 85-1507

ORDER OF CHARLES R. RICHEY,

UNITED STATES DISTRICT JUDGE

1-B

United States Court of Appeals

For the District of Columbia Circuit

CA 85-01507

Dorothy L. Noble,)

)

) Filed

Plaintiff,) Jan. 17, 1986

) James F.

) Davey,

v.) Clerk

)

John S. Herrington,)

Defendant)

ORDER

Upon the motion of the defendant and after consideration of the entire record in this matter, it is this 17th day of January, 1986.

ORDERED that plaintiff's petition for attorney's fees is denied without prejudice to its refiling upon the determination on the merits of the pending complaint.

signed Charles R. Richey

UNITED STATED DISTRICT JUDGE

APPENDIX C

District Court Opinion

Dorothy L. Noble

vs.

John S. Herrington

Civil Action No. 85-1507

MEMORANDUM AND ORDER OF CHARLES S. RICHEY,

UNITED STATES DISTRICT JUDGE

1-C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Dorothy L. Noble,	)	
	)	Filed
Plaintiff,	)	Feb. 16, 1988
	)	U.S. District
	)	Court, D.C.
v.	)	C.A. No. 85-1507
	)	
John S. Herrington,	)	
	)	
Defendant	)	

MEMORANDUM OF CHARLES R. RICHEY

UNITED STATES DISTRICT JUDGE

INTRODUCTION

Plaintiff Dorothy Noble began her government career as a GS-2 Clerk-Typist in 1955. By December, 1978, she had

worked her way up to Technical Information Specialist at the Department of Energy, a GS-12, Step 9 position. Effective May 1979, she was promoted on the recommendation of Mr. John Daniels, the manager of Ms. Noble's work unit, to a GS-13 job as Publications and Marketing Specialist.

On December 27, 1979, Ms. Noble filed a formal complaint alleging that she received unfair and hostile treatment because of her sex (there were no allegations of sexual harassment). On March 11, 1981, she sought EEO counseling concerning her view that she had been subjected to retaliation for filing her sex discrimination complaint. On August 21, 1981, the Department of Energy issued a Notice of Proposed disposition rejecting plaintiff's 1979 complaint. On

September 10, 1981, plaintiff requested a formal hearing on the charges she had brought.

Then, on October 6, 1981, plaintiff filed a second administrative complaint, this time alleging that she had been subjected to further discrimination and additional reprisal actions after filing her initial charges. By letter dated December 29, 1981, plaintiff was notified that the agency refused to hear her new complaint because it largely reiterated the earlier charges. She appealed this rejection to the EEOC Office of Review and Appeals.

An EEOC examiner conducted hearings on this appeal on July 7 and 8, 1982. On September 10, 1982, the EEOC ruled that the agency had erred in refusing to consider plaintiff's second complaint.

Upon defendant's request, the EEOC consolidated plaintiff's complaints and held extensive hearings on the combined complaints during several days in December, 1982.

On July 18, 1984, the EEOC examiner issued a decision rejecting plaintiff's sex discrimination claim as well as a constructive discharge claim that was apparently later consolidated with plaintiff's other charges. The Examiner also found that certain actions by plaintiff's co-workers were designed to coerce her into dropping her charges of discrimination and were tacitly approved by agency management. Accordingly, the Examiner found for plaintiff on this retaliation claim and awarded her $773.32 in attorney's fees. The agency did not appeal that ruling.

After receiving the EEOC decision, plaintiff filed this suit. She charges defendant with sex discrimination, reprisal, and constructively discharging her, all in violation of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §2000e et seq. After an amendment to her complaint and the grant of several continuances of the trial date, the Court set a final trial date of March 30, 1987. Thirteen days before trial began, plaintiff, for the first time, moved for partial summary judgment on her reprisal claims. As the Court was not afforded an adequate opportunity to consider this motion before trial, it exercised its discretion to reserve judgment on the motion until conclusion of the trial.

The Court conducted a bench trial in this case from March 30, 1987, through

April 7, 1987. Over the past several months, the Court has received extensive post-trial submissions. After thoroughly considering the entire record in this case and the underlying law, the Court finds that it must grant plaintiff's motion for partial summary judgment on her reprisal claim. The Court also finds that it must rule in favor of defendant in all other respects and will enter judgment accordingly. This Memorandum shall constitute the Court's findings of facts and conclusions of law, pursuant to Fed. R. Civ. P. 52(a).

I. THE COURT MUST GRANT PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On July 18, 1984, the EEOC ruled in plaintiff's favor on the reprisal charge.

Specifically, the attorney-examiner found that the following incidents constituted reprisal:

> (1) Twenty co-workers, constituting two-thirds of the employees in plaintiff's office, signed an open letter to John Daniels asserting that plaintiff's complaint of sex discrimination was untruthful and should be challenged and refuted. The letter further stated that the twenty signatories to the open letter had observed no instances of sex discrimination against any staff person by John Daniels, who had pursued an open policy of promotion and encouragement without regard to race, sex, religion, age or any other arbitrary factor. This open letter was prepared by the Special Assistant to Mr. Daniels and circulated throughout the office.
>
> (2) The second act of reprisal was the filing of a group grievance by plaintiff's co-workers against plaintiff. Management was aware of these co-workers' actions, or tacitly approved of them, in that management failed to take corrective action, the effect of which was to deprive plaintiff of the right to have her complaint processed free from restraint, interference, or coercion.

Plaintiffs Exhibit ("PL. EX.") 72.

Under 29 C.F.R. § 1613.221(b)(2), the agency was required either to adopt, reject, or modify this decision within thirty days. On July 25, 1984, the agency adopted the decision (which also rejected the remainder of plaintiff's charges) without exercising its right to appeal. Joint Stipulation of Undisputed Facts ("Stip.") 8. Therefore, under agency regulations that defendant does not challenge, that decision became "a final decision binding on the agency 30 calendar days after its submission to the agency." 29 C.F.R. § 1613.220(d).

In her motion for partial summary judgment, plaintiff argues that the EEOC's determination of reprisal is binding in light of the agency's failure to appeal the decision. Consequently, she asks the Court to enforce that

judgment, which was rendered after a hearing that lasted nine days.

The United States Court of Appeals for the District of Columbia Circuit has not yet decided whether an unappealed EEOC decision in a federal employee's favor is entitled to enforcement in a subsequent lawsuit on the same claims. See Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983)(issue raised but not decided). Other courts, however, have found that, because the regulations allow these decisions to become final and binding, this enforcement request should ordinarily be granted, without de novo review of the merits of the discrimination claim, as long as the relief ordered was within the EEOC's authority. See, e.g., Haskins v. Dep't of the Army, 808 F.2d 1192 (6th Cir.

1987); Pecker v. Heckler, 801 F.2d 709 (4th Cir. 1986); Moore v. Devine, 780 F.2d 1559, 1563 (11th Cir. 1986); Houseton v. Nimmo, 670 F.2d 1375 (9th Cir. 1982); Pearch v. Pierce, 31 Fair Empl. Prac. Cas. (BNA) 1244 (D. Or. 1981); White v. HHS, 30 Fair Empl. Prac. Cas. (BNA) 880, 882 (D.D.C. 1981).

The reasoning underlying these decisions is persuasive. The regulations specifically distinguish between administrative decisions in favor of state or private employees, which can lead only to provision of a "right to sue" letter, 29 C,.F.R. § 1601.28(b), and decisions in favor of federal employees, which become final and binding unless appealed. Thus, a federal employee is entitled to enforce an unappealed administrative decision if the EEOC had

authority to grant the relief ordered. This is particularly true in a case such as plaintiff's, where it is undisputed that the agency adopted the EEOC's findings and recommended decision. Hence, both defendant[1] and Court are bound to enforce that decision.

Defendant does not contest the EEOC's authority to order the relief it granted Ms. Noble.[2] Rather, he maintains that

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[1] There can be little doubt that the defendant agency is bound to follow its own rules and regulations. See, e.g., United States v. Nixon, 418 U.S. 683, 695 (1974); Reuters, Ltd. v. FCC, 781 F.2d 946, 950 (D.C. Cir. 1986); Panhandle Eastern Pipe Line Co. v. F.E.R.C., 777 F.2d 739, 749 (D.C. Cir. 1985).

[2] The complaints examiner recommended the following corrective action:

Where the retaliation does not result in a personnel action but instead takes the form of

plaintiff must choose one consistent course on the reprisal claim; she cannot seek enforcement of the EEOC decision and put forth additional evidence of alleged acts of reprisal that did not figure in the hearing examiner's decision. This argument is essentially irrelevant to a

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harassment by co-workers and acquiescence to this behavior by supervisors, the remedy which would make the aggrieved whole is a recommendation that such harassing behavior cease. However, as the Complainant is no longer employed by the Agency, such a recommended remedy is moot. While there is no remedy available under Title VII which can now make the Complainant whole for her injury, I can and do recommend that the Agency educate these employees who harassed the Complainant on their responsibility not to abuse wither the grievance/arbitration machinery of the employment discrimination process.

The examiner awarded attorney's fees as well. Pl. Ex. 72.

determination of plaintiff's motion.

The essence of defendant's argument is that plaintiff is attempting to rest on an already adjudicated finding of reprisal and to obtain additional relief based on a reappraisal of the portions of her reprisal claims that were rejected at the administrative level. Whether or not this was plaintiff's strategy, it is not what the Court allows.

Pursuant to case law and regulation, the Court must enforce the reprisal decision rendered by the EEOC and adopted by the agency -- and it will do no more. Plaintiff was permitted to go to trial on the reprisal claim, and to put forth evidence that allegedly supported the claim, only because the time of plaintiff's motion forced the Court to refrain from ruling on the motion until

it had sufficient time to study the relevant law.[3] That having been done, the Court cannot reexamine the rejected portions of plaintiff's reprisal claim.[4]

II. PLAINTIFF HAS NOT PROVED HER SEX DISCRIMINATION CASE

The legal standard governing a Title VII disparate treatment sex discrimination claim is clear. The plaintiff must ultimately prove that defendant intentionally discriminated against her

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[3] Trial courts regularly reserve judgement on legal questions. See, e.g., Fed. R. Civ. P. 41(b), 50(b); Fed. R. Crim. P. 29.

[4] The Court will consider the evidence going primarily to the issue of reprisal only insofar as that evidence is relevant to and may properly be considered in connection with plaintiff's sex discrimination and constructive discharge claims.

on the basis of sex. See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980); McKenzie v. Sawyer, 684 F.2d 62, 70 (D.C. Cir. 1982). Because discriminatory animus is often subtly shown, plaintiffs do not often have direct proof of a defendant's intent to treat them less favorably than their male colleagues. In recognition of this fact, the Supreme Court has established a system for allocating evidentiary burdens in cases where, as here, a plaintiff can at most offer indirect inferences of discrimination.

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), plaintiff may prove disparate treatment by first proving a prima facie case of discrimination. Defendant may then advance a legitimate, non-discriminatory

reason for its actions, which plaintiff can rebut by showing that the asserted reason is pretextual. Id. at 802-04. Although the burden of production changes between the parties, the plaintiff retains the burden of persuasion throughout the case. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 253, 255-56.

In this case, the plaintiff claims that she was discriminatorily denied a promotion for which she applied. In order to prevail on this claim, plaintiff must show: (1) that she belongs to a protected group; (2) that she was qualified and applied for a promotion; (3) that she was considered for and was

denied the promotion.[5] Id. at 253 and

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[5] The Court must make two points about this legal standard. The first is that a plaintiff alleging discriminatory failure to promote must usually prove, in addition to the above points, that the position remained open and was filled by a similarly qualified employee outside the protected group. E.g., Burdine, 450 U.S. 253 and n. 6. In keeping with the necessity to apply Title VII law flexibility to reflect the particular situation confronted by the plaintiff, the plaintiff was not required to prove this fourth element, which is largely irrelevant to a case involving a vacancy announcement that was withdrawn. See Order, March 24, 1987.

Plaintiff did, however, put forth evidence attempting to show that the vacancy to which she applied was subsequently filled by a man. In light of the March 24, 1987, Order, the Court will treat this evidence as relevant primarily to whether defendant's articulated reasons for his actions were pretextual.

That same March 24 Order fails to discuss plaintiff's burden of proving that she was qualified

n.6; Mitchell v. Baldrige, 759 F.2d 934, 951 (D.C. Cir. 1981). Plaintiff has not met her burden of proof.

On March 18, 1980, the Department of Energy issued Vacancy Announcement No. 80-544. This Announcement sought candidates for the position of Manager of the Energy Information Administration Clearinghouse at the GS-14 level. Testimony of Gwendolyn Riley ("Riley Testimony"); Stip. 50. The position had been vacant since November, 1979, and had

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for the position for which she applied. Under the law, plaintiff unmistakably has that burden. As Plaintiff presented evidence of her qualifications at trial, and never objected to defendant's presentation of evidence that she was unqualified for the position, the Court must find that plaintiff did not rely to her detriment on the incomplete statement of law in the March 24, 1987, Order.

previously been classified at the GS-16 level. Stip. 47. Plaintiff was one of forty-two applicants, including eight other women, for this position. Stip 50.

Like the position plaintiff then filled, this vacant position came under the supervision of Mr. John E. Daniels. Id. After a request from plaintiff, on April 2, 1980, Mr. Daniels submitted a relatively positive appraisal of plaintiff's work in connection with plaintiff's application for the vacant position. Testimony of John Daniels ("Daniels Testimony"). That appraisal notwithstanding, plaintiff has not shown that she was qualified for the position and therefore has not proved a prima facie case of discrimination.

The vacancy announcement specified that all applicants must have, inter

alia, "(a)t least one year of . . . experience . . . at a level of difficulty and responsibility comparable to the next lower grade in the federal service." Def. Ex. 91. Under the Interim Management Promotion Plan in effect at the agency when the vacancy announcement was issued, an applicant must meet this minimum qualification "within thirty calendar days of the closing date of the vacancy announcement." Def. Ex. 105, at 10.[6] The Plan also stated that any

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[6] Plaintiff argues that the Interim Management Directive is inconsistent with the regulation governing civil service promotions in effect in 1980. That regulation reads; "An agency may advance an employee to a position at GS-12 or above only after he has served one year at the next lower grade." 5 C.F.R. §300.602(a) (1980). The regulation clearly does not address whether the time-in-grade requirement must be met by the effective date of the

candidate not meeting this time-in-grade requirement would be deemed ineligible for further consideration for the vacancy. Id. at 9.

Vacancy Announcement 80-544 closed on April 8, 1980, and, therefore, only those applicants who had met the tine-in-grade requirements by May 8, 1980 were eligible for the position. As plaintiff was promoted to the GS-13 level on May 20,

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promotion or by another date during the agency's consideration of the employee's advancement. Nor is the Court aware of a judicial interpretation that would support the restrictive cast plaintiff attempts to put on the Directive's language (and plaintiff's has not cited such a case). As neither the regulation's plain language nor any judicial interpretation of the regulation supports plaintiff's argument, the Court finds that the Directive is not inconsistent with the relevant regulation.

1979, she would not have met the one-year requirement before May 20, 1980 -- more than thirty days after the vacancy announcement closed. Thus, plaintiff was never eligible for the position for which she applied.

Based on these facts, the Court finds that plaintiff failed to prove a prima facie case of sex discrimination with respect to her application for Vacancy 80-544. Even if she had made out a prima facie case, however, plaintiff did not rebut defendant's legitimate, non-discriminatory reasons for denying her the position.

On or shortly before April 4, 1980, then-President Carter imposed a "two-for-one" hiring freeze throughout the Executive Branch. Def. Ex. 27. Under the terms of that freeze, only 50 percent

of the vacancies occurring after February 28, 1980, could be filled with full-time appointments. Id.; Riley Testimony. Shortly after this freeze was imposed, all offices that had outstanding vacancy announcements were asked to reevaluate their staffing needs. Def. Ex. 27.

Pursuant to this request, John E. Daniels requested cancellation of Vacancy Announcement 80-544, the announcement to which plaintiff responded. Mr. Daniels testified that he requested this cancellation in order to have the position upgraded to GS-15, which was its prior grade level. Daniels testimony. This concern about the diminished grade level was fully consistent with Mr. Daniels' many attempts to upgrade positions under his supervision. Stip. 39.

Thus, discrimination played no part in the cancellation of the vacancy announcement. The announcement was cancelled not to avoid promoting plaintiff, one of forty-two applicants for the job, but after staffing needs were reevaluated in light of a general limitation on federal government hiring. Despite plaintiff's arguments, there is no persuasive, credible evidence that the decision to reassess the need for a GS-14 managerial position was merely a pretext for discriminating against plaintiff.

Plaintiff has made much of the supposed inconsistency between defendant's evidence that the position was cancelled because of a hiring freeze and the evidence that the position was cancelled because of a request from supervisor Daniels. As documented above,

there is nothing inconsistent about the two statements. Mr. Daniels, a man who impressed the Court as a thoroughly credible witness and a dedicated, if demanding, supervisor, testified that he, in effect, took advantage of the hiring freeze to ensure that the vacant position would be upgraded to its former responsibilities and grade level. On the basis of Mr. Daniels' testimony, the Court's determination of his credibility, and the other evidence in the record, the Court finds this explanation more probable than not.

There is another fact that strongly buttresses this finding. On January 9, 1981, the position of Manager of the Energy Information Administration Clearinghouse -- the position for which plaintiff applied in 1980 -- was

readvertised with expanded responsibilities as a GS-15 level job. Def. Ex. 96. Obviously, plaintiff's supervisor was successful in convincing his own superiors that the position and its accompanying responsibilities should be upgraded. Moreover, plaintiff herself assisted in drafting the revised description of the GS-15 job. Def. Ex. 45. In light of these facts, plaintiff's claims that defendant's explanations are post-hoc pretexts for discrimination ring particularly hollow.

The Vacancy Announcement for the GS-15 job was to close on January 30, 1981. But four days earlier, President Reagan imposed a hiring freeze in civilian federal employment that led to the cancellation of this announcement. The position was never filled permanently.

Riley testimony; Testimony of John Weiner ("Weiner testimony").

Plaintiff nonetheless charges that the "same" vacancy for which she applied was later filled by a man and thus all explanations for defendant's conduct are pretextual. This is not so. Mr. John Weiner, a GS-14 level employee, was transferred within his grade and named the Acting Director of the Energy Information Administration Clearinghouse in March, 1981. Def. Ex. 82. This within-grade transfer was specifically exempted from competitive hiring processes because it resulted neither in a promotion nor potential for a promotion. Def. Ex. 51 at 9; Weiner

testimony.[7] Although Mr. Weiner was formally appointed manager of the reorganized in July 1981. Riley testimony; Weiner testimony. Although Mr. Weiner was formally appointed manager of the reorganized Publications Services Division, that bureau was neither as comprehensive in scope nor functionally the same as the Energy Information Administration Clearinghouse. Stip. 17 Consequently, Mr. Weiner never permanently filled the position to which plaintiff applied. Defendant's actions with respect to Mr. Weiner simply do not support a charge of pretext.

The Court must note another fact that

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[7] There is no evidence that the Vacancy Announcement was withdrawn so that Mr. Weiner could fill the position on either a temporary or a permanent basis.

is far too apparent after reviewing the exhibits and testimony in this case. In contrast to other employees in her division, who welcomed the collegial atmosphere that Mr. Daniels strived to create, plaintiff was a notably uncooperative worker who refused to assume responsibilities expected from a professional of her rank and tenure. E.g., Def. Ex. 13; Pl. Ex. 18; Daniels testimony; Ford testimony; Somers testimony. Time and again, plaintiff failed to meet deadlines for submission of her work, and time and again she failed to offer any acceptable explanation for her poor performance. See, e.g., Def. Ex. 11, 19, 86, 93; Daniels testimony; Ford testimony. This failure continued unabated despite efforts to reduce plaintiff's workload to

ensure that priority tasks were completed. E.g., Def. Ex. 16. At least in one instance, this failure to do her job resulted in a three-month delay in a major project under plaintiff's Supervision. Def. Ex. 23-26; 28, 30, 31. Plaintiff simply could not perform, or was unwilling to perform, at the level rationally expected of her by her superiors.

Plaintiff's shortcomings as a manager are evident in another important area as well. Her relationships with superiors, colleagues, and subordinates were racked with conflict. Two of plaintiff's subordinates filed grievances against her, charging that she refused to abide by federal regulations with respect to personnel evaluations and the privacy of certain employment forms. Def. Ex. 56,

57, 69. On the basis of the grievances and the testimony at trial, the Court finds that those grievances were not retaliation against plaintiff for filing an EEO complaint but were legitimate and justifiable complaints about plaintiff's failure to perform her responsibilities properly.[8] In her testimony, plaintiff treated the Court to minute details of

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[8] This finding is not in conflict with the Court's conclusion that it must enforce the unappealed EEOC decision upholding plaintiff;s retaliation claim. The EEOC decision is based on a group grievance filed after these individual complaints were filed; indeed, the recommended decision contains a finding of fact on the individual decisions substantially similar to the Court's conclusion. See Recommended Decision, at 22 (attached to Plaintiff;s Motion for Partial Summary Judgement). For a summary of the basis of the EEOC decision, see supra at 3-4.

her charges and counter-charges against her co-workers and supervisors. The Court has carefully considered each alleged fact set forth by plaintiff, and has examined each allegation in conjunction with the other testimony and the numerous exhibits introduced at trial. On the basis of the totality of the evidence, and the Court's determinations of credibility, the Court finds that plaintiff's claims are simply unworthy of credence. Far from the model supervisor and worker she painted herself, plaintiff was, at best, an inept and unsatisfactory manager and worker who brought whatever difficulties she experienced upon herself. There were, in other words, many non-pretextual, non-discriminatory reasons for denying plaintiff a promotion, quite apart from

the fact that the vacancy announcement was cancelled.

The Court is keenly aware that many victims of discrimination are confronted with unfounded attacks upon their job performance. Plaintiff is not one of them. Put plain, there is no basis in this record to support plaintiff's claim of unlawful sex discrimination. Indeed, the record makes one fact painfully clear. what plaintiff seeks in this suit is not a shield against discrimination but a transformation of that shield into a sword for attacking those who wanted nothing more than an adequately productive colleague, subordinate, or superior. This the Court will not do.

PLAINTIFF HAS NOT PROVED HER CONSTRUCTIVE DISCHARGE CLAIM.

Plaintiff maintains that she was subject to a progressive campaign of harassment and hostility. She testified that the campaign took the form of intermittent pranks and "tricks," of publication throughout the office of the subject of her discrimination complaints, and of an office atmosphere poisoned by contempt for her, "shunning" of her and her few friends, and by the consequences of the allegedly autocratic rules of her allegedly tyrannical superior, John Daniels. Noble testimony; Testimony of Elsie Weigel ("Weigel testimony"). On the basis of this evidence, plaintiff asks the Court to find that she did not retire from federal service when she departed on September 25, 1981, but was constructively discharged.

To sustain a constructive discharge claim, plaintiff must show that her employer intentionally made her working conditions so intolerable that a reasonable person would be forced to resign. Clark v. March, 665 F.2d 1168, 1173 (D.C. Cir. 1981). Plaintiff has not sustained her burden of proof on this point.

First, plaintiff's conduct belies her claim that her working conditions were intolerable. By plaintiff's own admission, the "tricks" and pranks that her co-workers allegedly played against her ceased altogether more than a year before plaintiff retired. - Noble testimony. While the "campaign" against her was underway, plaintiff more than once turned down opportunities to transfer to a different position. Noble

testimony; Daniels testimony. Indeed, plaintiff admitted that she remained at her post for fifteen months after the "tricks" ended, a fact that makes her attempt to relate her resignation to those tricks highly suspect.

The testimony of plaintiff's opinion witness, Dr. Hamilton, did not strengthen plaintiff's case. Although Dr. Hamilton concluded that the working environment was overly stressful, the basis for that opinion was, to say the least, questionable. Dr. Hamilton first assumed that all actions taken against plaintiff were retaliatory, then found that an objectively intolerable environment existed in 1981 largely on the basis of acts that occurred in 1980. Hamilton testimony. Both the premise and the logic leading to the conclusion from it

are obviously problematic.[9]

Moreover, Dr. Hamilton stated that her conclusions ere based on the Axis IV coding system of the American Psychiatric Association DSM III Manual, which she admitted was designed to supplement an analysis of the psychological characteristics of the particular person evaluated. As Dr. Hamilton never examined those individual characteristics, but simply looked at stress factors in isolation, her reliance

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[9] The Court recognizes that the ill-feeling and mistrust created by co-worker harassment can have effects extending well beyond the time when the harassment ceases. Nonetheless, the Court also finds that Plaintiff has failed to prove with credible evidence that a reasonable person would have found the office atmosphere intolerable fifteen months after the particular forms of harassment ceased.

on this "supplemental" diagnostic tool limits the validity and reliability of her conclusions. Furthermore, Dr. Hamilton also admitted that the DSM III Manual is slanted in favor of "victims," and thus offers little objective guidance to the trier of fact.

Indeed, even if the workplace tension were as severe as Dr. Hamilton described it, it would not amount to a basis for a constructive discharge claim. There is no proof whatever that plaintiff's employer deliberately fostered the hostility, and a constructive discharge claim cannot lie absent such proof. Clark v. March, 665 F2 at 1172-74. The credible evidence overwhelmingly shows that the hostility flowed not from her employer's deliberate efforts but from plaintiff's lack of cooperation with and

antagonistic attitude toward her co-workers and supervisors, constant complaints that others were not performing their work properly, suspiciousness culminating in compulsive note-taking on conversations with her colleagues, and failure to perform her own job up to legitimate expectations. Testimony of Daniels, Somers, McKay, McCarley, and Ford. These unfortunate facts are in no way attributable to a deliberate effort by plaintiff's supervisors to force her to resign.

If anything, the evidence suggests that plaintiff's supervisors continually attempted to ease plaintiff's situation. Plaintiff admits that management promptly attempted to stop the "pranks" allegedly committed by her co-workers once she reported them. Noble testimony. Despite

plaintiff's unsatisfactory performance, supervisor Daniels did not take adverse personnel action against her. Daniels testimony; Def. Ex. 13 and 93. Mr. Daniels also refrained from hearing the employee grievances against plaintiff until he received notice that he was "required" to try to resolve the grievance. Def. Ex. 59. These facts fly in the face of plaintiff's constructive discharge claim.

Moreover, the evidence clearly shows that plaintiff was not "forced" to resign but welcomed the opportunity to take early retirement and change her lifestyle. At the time of her departure, plaintiff described her early retirement plans as a wonderful opportunity to change her lifestyle and begin to do some consulting work. Ford testimony; Riley

testimony. In light of these statements, and the abundant evidence suggesting that any tensions in the working environment had eased by September, 1981, the Court does not believe plaintiff's testimony that her supervisors acquiesced in harassment so potent that plaintiff was forced to quit her job.

Consequently, the Court finds that plaintiff has proved neither that her employer deliberately made her working conditions intolerable nor that a reasonable person in plaintiff's position would have felt compelled to quit her job. As such, the Court must find that plaintiff has failed to prove her constructive discharge claim by a preponderance of the evidence.

THE REMEDY FOR RETALIATION

The questions of statutory violation and appropriate remedy are conceptually distinct. Smith v. Secretary of the Navy, 659 F.2d 1113, 1120, (D.C. Cir. 1981); Day v. Mathews, 530 F.2d 1083, 1084-85 (D.C. Cir. 1976). In this case, the Court has found that plaintiff is entitled to summary judgment on her retaliation claim, in light of the unappealed administrative finding that the plaintiff's co-workers, with the tacit support of management, retaliated against her for filing a discrimination claim. The Court has also found that plaintiff is not entitled to judgment on her sex discrimination and constructive discharge claims. The Court must now consider what form of relief would be appropriate in this case.

Although back pay is usually awarded to a successful Title VII plaintiff, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975), a back pay award would be unwarranted absent a finding of economic loss. Segar v. Smith, 738 F.2d 1249, 1291 (D.C. Cir. 1984), cert. denied sub nom. Meese v. Segar, 471 U.S. 1115 (1985); Smith v. Secretary of the Navy, 659 F.2d 1113, 1122 (D.C. Cir. 1981). As plaintiff was not denied a promotion, a raise, or an employment opportunity -- as she suffered no financial loss because of defendant's retaliatory action -- plaintiff is not entitled to a back pay award in this case.

Nor can the Court order plaintiff's reinstatement. In light of plaintiff's repeated statements at trial and in post-trial briefs and memoranda that she does

not want her job back, equity counsels against any order reinstating plaintiff in her former position.

Damages would be inappropriate in this case as well. In this circuit, as in the vast majority, a court may award only equitable remedies in Title VII cases. See, e.g., Bundy v. Jackson, 641 F.2d 934, 946 n.12 (D.C. Cir. 1981); see also, e.g., Bohan v. City of East Chicago, 799 F.2d 1180, 1184 (7th Cr. 1986; Muldrew v. Anheuser-Busch, 728 F.2d 989, 992 n.21 (8th Cir. 1984). Thus, the Court cannot award plaintiff damages or any other remedy at law.

Of course, a plaintiff may suffer harm from discrimination absent an actually monetary loss. In Smith v. Secretary of the Navy, 659 F.2d 1113 (D.C. Cir. 1981), the District of Columbia Court of Appeals

found that an unfavorable assessment of an employee, which was issued in unlawful retaliation for his work as an EEO counselor, materially diminished the plaintiff's chances for advancement. Because the plaintiff had not suffered a monetary loss from this Title VII violation, the Court ordered that the offending appraisal be destroyed, effectively ordering the discriminatory behavior to cease. Id. at 1122.

As in Smith , the logical remedy in this case would be to order that the discriminatory behavior of the defendant agency cease. As plaintiff no longer works at the defendant agency however, this remedy would be inappropriate. Nonetheless, consistent with the Court's "duty to render a decree which will so far as possible eliminate the

discriminatory effects of the past as well as bar like discrimination in the future," Albemarle Paper Co. v. Moody, 422 U.S. at 418 (quoting Louisiana v. United States, 380 U.S. 145 (1965) (emphasis added), the Court shall order the following relief:

(1) The Department of Energy shall establish a training and counseling program for all of its managers and supervisory personnel to ensure that no further retaliatory actions will take place against any of its employees who file discrimination cases.

This program shall be instituted within 30 days of the date of the Order accompanying this Opinion, and the Department shall submit a written report, within six months after the program is instituted, detailing its compliance with

this Order.

(2) All grievances filed against plaintiff shall be placed under seal and maintained in a separate record at the Department of Energy.

(3) Defendant shall expunge from plaintiff's personnel records any reference to the matters that formed the basis for the administrative finding of retaliation. (The pertinent portions of the administrative finding are quoted supra at 3-4.)

CONCLUSION

The record in this case documents the sorry history of plaintiff's employment at the Department of Energy. In light of the overwhelming, credible evidence that defendant had a legitimate, non-discriminatory, non-pretextual rationale

for denying the promotion sought by plaintiff, the Court must grant judgment in defendant's favor on plaintiff's sex discrimination claim. Similarly, the overwhelming weight of credible evidence supports a finding that defendant did not constructively discharge plaintiff, and the Court will grant judgment in defendant's favor on that claim as well. Because defendant did not appeal the administrative finding that the plaintiff had been subject to retaliation for her claim of discrimination, the Court must grant plaintiff's motion for summary judgment on that claim.

Counsel for the plaintiff, who were appointed pro bono publico, have the Court's thanks for their extraordinarily able and original legal work. They will be discharged after the Court rules on

any motions for costs and attorneys' fees they are compelled to file. the Court hopes that the government and plaintiff's counsel can agree on fair and reasonable fees and costs without the Court's intervention. If that proves impossible, counsel will have thirty days from the date of the Order accompanying this Memorandum to file any appropriate motions. In light of the Court's decision, any currently pending motions for attorney's fees and costs will be denied.

The Court recognizes that this Opinion contains strong language that may be hurtful to the plaintiff. Thus, the Court earlier broached with counsel for both parties the advisability of placing this Opinion under seal. In light of that discussion, the Court will order

that this memorandum and the accompanying Order be placed under seal. If, however, plaintiff chooses to appeal the Court's decision, this Opinion and the accompanying Order shall automatically be made available to the public and shall become part of the public record in this case.

This case shall stand dismissed from the dockets of this Court.

February 16, 1988 signed
DATE

CHARLES R. RICHEY
UNITED STATES
DISTRICT JUDGE

51-C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Dorothy L. Noble,	)	
	)	Filed
Plaintiff,	)	Feb. 16, 1988
	)	U.S. District
	)	Court, D.C.
v.	)	C.A. No. 85-1507
	)	
John S. Herrington,	)	
	)	
Defendant	)	

ORDER

In accordance with the Memorandum of even date herewith, and for the reasons set forth therein, it is this 16th day of February, 1988,

ORDERED that Plaintiff's motion for partial summary judgement on her reprisal claims shall be, and hereby is, granted; and it is

FURTHER ORDERED that, accordingly, judgement shall be entered in plaintiff's favor on her retaliation claim, and, with respect thereto, the following relief is ordered:

(1) The Department of Energy shall establish a training and counseling program for all of its managers and supervisory personnel to the end that no further retaliatory actions will take place against its employees.

This program shall be instituted within thirty (30) days hereof and the Department shall report back to this Court within six months after the program is instituted as to its compliance with

this Order; and

(2) All grievances filed against plaintiff shall be placed under seal and maintained in a separate record at the Department of Energy; and

(3) Defendant shall expunge from plaintiff's personnel records any reference to the matters that were the basis for the administrative finding of retaliation. Specifically, those matters were: the January 17, 1980, open letter of complaint about plaintiff; and the January 21, 1981, group grievance filed against plaintiff; and it is

FURTHER ORDERED that judgement shall be entered in defendant's favor on plaintiff's sex discrimination and constructive discharge claims; and it is

FURTHER ORDERED plaintiff shall submit any necessary post-judgement motions for

attorney's fees and costs within thirty days of the date of this Order; and it is

FURTHER ORDERED that this case shall stand dismissed from the dockets of this Court.

signed

Charles R. Richey

CHARLES R. RICHEY

UNITED STATES DISTRICT JUDGE

APPENDIX D

January 19, 1989 U.S. Court of Appeals

Summary Affirmance

and

April 17, 1989 U.S. Court of Appeals

Denial of Petition for Rehearing and

Suggestion for Rehearing En B anc

Dorothy L. Noble

vs.

John S. Herrington

Civil Action No. 88-5139

1-D

United States Court of Appeals

For the District of Columbia Circuit

No. 88-5139 September Term, 1988

CA 85-01507

Dorothy L. Noble, Appellant

U.S. Court of Appeals Filed Jan. 19, 1989 Constance L. Dupre Clerk

v.

John S. Herrington,

Secretary

U.S. Dept. of Energy

BEFORE: Starr, Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of Appellee's petition for summary affirmance and the response thereto, it is

ORDERED that the motion be granted. Based upon the record before us, we conclude that the district court's factual findings are not clearly erroneous. See Fed. R. Civ. P. 52(a; Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985. Accordingly, the district court's order filed February 16, 1988, granting appellant partial summary judgement and entering

judgement for appellee on appellant's remaining claims is summarily affirmed. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987 (per curium.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curium

4-D

United States Court of Appeals

For the District of Columbia Circuit

No. 88-5139 September Term, 1988

CA 85-01507

Dorothy L. Noble, Appellant

U.S. Court

of Appeals

Filed

April 17, 1989

Constance L.

Dupre

Clerk

v.

John S. Herrington,

Secretary

U.S. Dept. of Energy

BEFORE: Starr, Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of Appellant's petition for rehearing filed March 20, 1989, it is,

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

By: signed Robert A. Bonner

ROBERT A. BONNER

DEPUTY CLERK

6-D

United States Court of Appeals

For the District of Columbia Circuit

No. 88-5139 September Term, 1988

CA 85-01507

Dorothy L. Noble, Appellant

U.S. Court

of Appeals

Filed

April 17, 1989

Constance L.

Dupre

Clerk

v.

John S. Herrington,

Secretary

U.S. Dept. of Energy

BEFORE: Wald, Chief Judge, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H., Ginsburg, and Sentelle, Circuit Judges

ORDER

Appellant's Suggestion for Rehearing En Banc has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

By: Signed Robert A. Bonner

ROBERT A. BONNER

DEPUTY CLERK

DEPUTY CLERK

APPENDIX E

Excerpt from Dorothy L. Noble
District Court Testimony

Dorothy L. Noble

vs.

John S. Herrington

Civil Action No. 85-1507

TRIAL TRANSCRIPT PAGES 46 THROUGH 72

Q NOW, MS. NOBLE, DID ANYTHING UNUSUAL BEGIN AT WORK AFTER YOU BEGAN TALKING WITH MS. PASS, THE EEO COUNSELOR?

A YES, I BEGAN TO NOTICE THINGS DISAPPEARING FROM MY OFFICE.

Q CAN YOU DESCRIBE WHAT THINGS BEGAN DISAPPEARING FROM YOUR OFFICE?

A YES. THERE WERE FILE BOXES THAT WERE STOLEN FROM MY OFFICE.

Q ANYTHING ELSE AT THIS POINT, IN NOVEMBER OF 1979?

A YES. COTTON HAD BEEN PLACED IN MY TELEPHONE IN SUCH A FASHION THAT I COULDN'T HEAR.

Q SO IT WAS IN THE EARPIECE OF THE PHONE?

A IN THE EARPIECE, YES.

Q MS. NOBLE, COULD YOU LOOK AT THE NEXT EXHIBIT IN THE STACK OF EXHIBITS BEFORE YOU THAT'S BEEN MARKED AS

PLAINTIFF'S EXHIBIT 12?

HAVE YOU SEEN THIS DOCUMENT BEFORE, MS. NOBLE?

A YES.

Q CAN YOU TELL US WHAT IT IS?

A YES. THIS IS ONE OF THE THEFT REPORTS THAT I HAD DONE. THIS ONE ALSO COVERS THE FACT THAT THE TRANSMITTER WAS STOLEN FROM THE TELEPHONE.

THE COURT: WHAT WAS STOLEN FROM THE TELEPHONE?

THE WITNESS: THE TRANSMITTER, MICROPHONE.

MR. LUTZ: I THINK THE WORD SHE JUST USED WAS TRANSMITTER, YOUR HONOR, AND MICROPHONE.

THE WITNESS: IS THIS POSITIONED INCORRECTLY?

THE COURT: IT'S TOO CLOSE TO YOUR MOUTH, MA'AM.

HELP HER, MR. CLERK.

RELAX, THAT'S FINE.

MR. LUTZ: RELAXING IS THE HARD PART.

THE WITNESS: IS THIS OK? CAN YOU HEAR ME?

THE COURT: THAT'S MUCH BETTER.

BY MR. LUTZ:

Q MS. NOBLE, IF YOU LOOK DOWN ABOUT TWO-THIRDS OF THE WAY DOWN PLAINTIFF'S EXHIBIT 12, ON THE LEFT-HAND SIDE, THERE IS A SIGNATURE THAT SAYS DOROTHY L. NOBLE.

IS THAT YOUR SIGNATURE, MS. NOBLE?

A YES, IT IS.

Q DID YOU FILL OUT THE WRITING ON THIS REPORT OF LOSS OR THEFT, PX-12?

A YES.

MR. LUTZ: I'D LIKE TO MOVE THE

INTRODUCTION OF PX-12 IN EVIDENCE, YOUR HONOR.

THE COURT: NO OBJECTION?

ALL RIGHT, IT WILL BE RECEIVED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NO. 12 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT NO. 12 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q MS. NOBLE, BEFORE PURSUING EEO COUNSELING, HAD YOU HAD PROBLEMS WITH ITEMS LIKE YOUR CHAIR AND YOUR FILE BOXES DISAPPEARING FROM YOUR OFFICE?

A OH, NO.

THE COURT: OH, NO?

THE WITNESS: NO.

BY MR. LUTZ:

Q HAD YOU HAD PROBLEMS WITH PEOPLE TAMPERING WITH YOUR PHONE BEFORE YOU

PURSUED EEO COUNSELING?

A NO.

Q WAS THEFT OF OFFICE POSSESSIONS A COMMON PHENOMENON IN OEIS?

A NO, NOT THAT I KNOW OF.

Q DID YOU CONTINUE TO PURSUE COUNSELING WITH MS. PASS THROUGH NOVEMBER AND EARLY DECEMBER OF '79?

A YES I DID.

Q DID THIS COUNSELING APPEAR TO YOU TO HAVE ANY EFFECT ON YOUR DIFFICULTIES WITH MR. DANIELS?

A YES. THE SITUATION GREW WORSE.

Q YOUR PERCEPTIONS OF DISCRIMINATION?

A YES.

Q HOW LONG DID YOU PURSUE COUNSELING?

A UNTIL THE END OF DECEMBER OF 1979.

Q WHAT HAPPENED THEN, MS. NOBLE?

A THEN I CONCLUDED THAT THE COUNSELING ROUTE WAS NOT EFFECTIVE, SO I FILED THE ADMINISTRATIVE SEX DISCRIMINATION CLAIM ON DECEMBER 27, 1979.

Q NOW, MS. NOBLE, COULD YOU LOOK AGAIN IN THE STACK OF DOCUMENTS BEFORE YOU AT WHAT'S BEEN MARKED AT PX-8?

HAVE YOU SEEN THIS DOCUMENT BEFORE?

A YES, I HAVE.

Q COULD YOU TELL US WHAT IT IS?

A THIS IS THE COMPLAINT THAT I JUST SPOKE OF.

Q AND DOES YOUR SIGNATURE APPEAR AT THE BOTTOM OF THE FRONT PAGE OF THAT COMPLAINT?

A YES.

THE COURT: MAY I SEE IT?

DEPUTY CLERK: YES, SIR.

THE COURT: GO AHEAD.

MR. LUTZ, I'D LIKE TO MOVE THE INTRODUCTION OF PX-8 INTO EVIDENCE, YOUR HONOR.

THE COURT: ANY OBJECTION?

MS. LEWIS: NO, YOUR HONOR.

THE COURT: IT WILL BE RECEIVED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NO. 8 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT NO. 8 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q MS. NOBLE, DID YOU TELL ANYONE AT OEIS THAT YOU HAD FILED YOUR COMPLAINT, PX-8?

A NO, I DID NOT.

Q AFTER YOU FILED YOUR COMPLAINT,

DID IT APPEAR THAT OTHERS IN THE OFFICE KNEW ABOUT IT?

A YES, IT DID.

Q WHY DO YOU SAY THAT? WHAT MADE YOU THINK OTHER PEOPLE KNEW ABOUT THE COMPLAINT?

A ONE DAY, IN MID-JANUARY 1980, I RETURNED FROM A LUNCHEON MEETING, AND THERE WAS A LETTER ON MY CHAIR, IT LOOKED LIKE A PETITION, AND IT WAS SIGNED BY ABOUT TWO-THIRDS OF THE PEOPLE WHO WORKED IN THE OFFICE.

THESE PEOPLE INDICATED THAT THEY HAD LEARNED OF MY DISCRIMINATION COMPLAINT AND THEY WERE SAYING, IN EFFECT, THAT MY CHARGES WERE FALSE.

Q MS. NOBLE, COULD YOU LOOK AGAIN AT THE STACK OF DOCUMENTS BEFORE YOU AT WHAT HAS BEEN MARKED AS PX-11?

HAVE YOU SEEN THAT DOCUMENT

BEFORE?

A YES. THIS IS THE OPEN LETTER.

Q THIS IS THE DOCUMENT YOU WERE JUST REFERRING TO?

A YES, IT IS.

MR. LUTZ: I WOULD LIKE TO MOVE PX-11 INTO EVIDENCE, YOUR HONOR.

THE COURT: ANY OBJECTION?

MS. LEWIS: NO OBJECTION.

THE COURT: IT WILL BE RECEIVED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NO. 11 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT NO. 11 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q NOW, JUST SO THAT I REMEMBER PROPERLY, MS. NOBLE, HOW MANY EMPLOYEES DID YOU SAY THAT THERE WERE IN OEIS IN

JANUARY OF 1980?

A NOT MORE THAN ABOUT 30.

Q THERE'S ALMOST 20 SIGNATORIES TO THIS LETTER?

A YES.

Q WHAT DID YOU THINK WHEN YOU FOUND THAT LETTER, MS. NOBLE? WHAT WAS YOUR REACTION?

A I WAS HURT. I HAD PURSUED THE EEO PROCESS I HAD THOUGHT WAS SUPPOSED TO BE CONFIDENTIAL, AND I RECEIVED THIS AND --

THE COURT: HOW COULD YOU SAY YOU THOUGHT IT WAS CONFIDENTIAL, WHEN YOU TOLD MR. DANIELS, WHO WAS THE OBJECT OF YOUR CLAIMS OF SEX DISCRIMINATION, THAT IT WAS NECESSARILY SECRET?

YOU TOLD HIM WHAT YOU HAD DONE.

THE WITNESS: I HAD TOLD HIM. I HAD TOLD NOBODY ELSE.

MR. LUTZ: YOUR HONOR, OF COURSE MS. NOBLE CAN SPEAK FOR HERSELF, BUT I THINK HER TESTIMONY WAS SHE TOLD MR. DANIELS ABOUT THE COUNSELING EFFORTS, BUT NOT THAT SHE TOLD HIM ABOUT THE COMPLAINT.

THE COURT: ALL RIGHT. THANK YOU.

BY MR. LUTZ:

Q GO ON, MS. NOBLE. YOU WERE EXPLAINING YOUR REACTION TO THIS OPEN LETTER.

WERE YOU DONE?

A AGAIN, I WAS HURT, I WAS BEWILDERED, I WAS CONFUSED. IT WAS VERY UPSETTING.

Q DID YOU KNOW THE PEOPLE WHO HAD SIGNED THIS OPEN LETTER?

A YES, I DID.

Q DID YOU NORMALLY COME INTO

CONTACT WITH THEM DURING THE DAY IN THE OFFICE?

A OH, YES. WE WORKED CLOSELY TOGETHER ON A DAILY BASIS.

Q WERE ANY OF THESE PEOPLE SUPERVISORS AT OEIS, THE PEOPLE WHO SIGNED THE PX-11?

A YES.

Q CAN YOU IDENTIFY WHO, AMONG THE SIGNATORIES, WERE SUPERVISORS?

A YES. SHELLY PROSSER, PATRICIA JACOBUS, MARY HALL, AND NANCY NICOLETTI.

Q NOW, MS. NOBLE, THERE IS A NAME ABOUT MIDWAY DOWN THE LEFT-HAND COLUMN OF THIS LINE OF SIGNATURES THAT APPEARS TO BE RICHARD FRANCIS.

DO YOU SEE THAT?

A YES.

Q DID YOU KNOW A RICHARD FRANCIS IN THE OFFICE AT THE TIME?

A YES.

Q WHAT WAS HIS POSITION AT THE TIME?

A HE WAS SUPPOSED TO BE A SUBORDINATE OF MINE.

Q SO A SUBORDINATE OF YOURS WAS SIGNING AN OPEN LETTER AMONG OTHER THINGS SAYING THAT YOUR CHARGES WERE SPECIOUS?

A THAT'S CORRECT.

Q JUST ACROSS FROM MR. FRANCIS'S SIGNATURE THERE IS A SIGNATURE THAT I THINK IS BERNARD MC KAY.

DID YOU KNOW A MR. MC KAY?

A YES, I DID.

Q WHO WAS HE?

A HE WAS MR. DANIEL'S SPECIAL ASSISTANT AT THE TIME.

Q AND AT THE TOP OF THE COLUMN IN WHICH MR. MC KAY'S SIGNATURE APPEARS, A NAME THAT APPEARS TO BE JUSTINE JOHNSON.

DID YOU KNOW MS. JOHNSON?

A YES.

Q WHAT DID SHE DO AT DOE?

A SHE WAS AN EEO COUNSELOR.

Q SO AN EEO COUNSELOR SIGNED THIS OPEN LETTER OPPOSING YOUR CHARGE?

A THAT'S CORRECT.

Q DID YOU TALK TO ANY OF THE PEOPLE WHO SIGNED THIS LETTER AFTER YOU RECEIVED IT? DID YOU TALK TO THEM ABOUT IT?

A NO, I DID NOT.

Q WHY NOT?

A WELL, I WAS ALREADY WOUNDED BY THIS, THESE PEOPLE THAT I WORKED WITH EVERY DAY TELLING ME MY CHARGES ARE SPECIOUS, AND TELLING ME WHAT THEY THOUGHT OF ME, IN EFFECT.

QUITE FRANKLY, I WAS EMBARRASSED TO TALK TO THEM. IT WAS JUST LIKE RUBBING SALT INTO THE WOUND. I DIDN'T

TALK TO THEM ABOUT IT.

THE COURT: WHAT WAS THE DATE OF THIS LETTER? WHEN DID YOU FIND IT ON YOUR DESK?

THE WITNESS: IT WAS JANUARY 17TH, 1980. I WON'T FORGET IT.

THE COURT: JANUARY 17TH.

THE WITNESS: YES.

THE COURT: 1980?

THE WITNESS: THAT'S CORRECT.

BY MR. LUTZ:

Q MS. NOBLE, DID THE EXISTENCE OF THIS LETTER HAVE AN EFFECT ON YOUR ABILITY TO DEAL WITH OTHERS IN THE OFFICE?

A YES, IT DID. AS I POINTED OUT, THESE ARE PEOPLE THAT I WORK WITH ON A DAILY BASIS, SOME OF THEM HAVING CONTACT WITH CONSTANTLY IN THE COURSE OF THE DAY.

AND, AS I TOLD YOU, IT WAS A

SMALL OFFICE, WE WORKED TOGETHER IN A COORDINATED, COLLEGIAL MANNER, AND GETTING SOMETHING LIKE THIS, JUST FRANKLY, IT DRIVES A WALL BETWEEN YOU. IT MAKES IT DIFFICULT.

Q DID IT BOTHER YOU THAT THE OPEN LETTER WAS AIMED AT THE CHARGE THAT YOU HAD FILED?

A YES, VERY MUCH.

Q WHY?

A I THOUGHT THAT THE CHARGE -- AT THE TIME I THOUGHT THAT I HAD SOME MECHANISM BY PURSUING COUNSELING AND FILING THE COMPLAINT OF WORKING OUT THE PROBLEMS.

I HAD THOUGHT THE PROCESS WAS CONFIDENTIAL AND THEN TO HAVE THIS, IT SLAPPED ME IN THE FACE.

Q NOW, EARLIER, MS. NOBLE, YOU MENTIONED THEFT OF OFFICE PROPERTY THAT

OCCURRED IN NOVEMBER OF 1979.

WAS THERE ANY MORE OF THAT AFTER YOU FILED THAT COMPLAINT?

A YES, IT INCREASED.

Q CAN YOU DESCRIBE WHAT HAPPENED AFTER YOU FILED YOUR COMPLAINT AS FAR AS YOUR OFFICE POSSESSIONS GO?

A WELL, FIRST, WHEELS WERE TAKEN OFF MY CHAIR SO WHEN I WOULD GO TO SIT DOWN I'D FALL.

THEN MY CHAIR WAS STOLEN, AND THERE WAS A CONTINUING PROBLEM OF THE TELEPHONE. THE TELEPHONE MICROPHONE/TRANSMITTER WAS REMOVED THREE OR FOUR TIMES.

IT GOT SO THAT I HAD TO -- I GOT FROM THE TELEPHONE REPAIR PEOPLE A SET OF MICROPHONES IN ORDER TO JUST REPLACE THEM MYSELF.

THEN ONE DAY THE WIRES OF THE

TELEPHONE, THE WIRES TO THE SECTION WHERE YOU WOULD HEAR ON THE TELEPHONE WAS DISCONNECTED.

Q WERE THEY UNSCREWED OR CUT OR WHAT?

A THEY WERE CUT.

Q MS. NOBLE, YOU WERE TALKING ABOUT CHAIR THEFTS AND TAMPERING AND SO FORTH. AS FAR AS YOU KNOW, MS. NOBLE, WAS ANYONE ELSE IN OEIS HAVING PIECES OF HIS TELEPHONE TAKEN?

A OH, NO.

Q HOW ABOUT CHAIRS AND WHEELS ON CHAIRS, WAS THAT SOMETHING THAT COMMONLY HAPPENED IN THE OFFICE?

A NO.

Q WHAT DID YOU DO ABOUT THESE THINGS?

A I REPORTED THEM TO MR. DANIELS AND TO VARIOUS OTHER PEOPLE.

Q WHAT DID MR. DANIELS DO WHEN YOU REPORTED THESE THINGS TO HIM?

A OTHER THAN TELLING ME TO CALL SECURITY, I DON'T THINK HE DID ANYTHING ELSE.

Q DID YOU REPORT THE INCIDENTS TO SECURITY?

A YES, I DID.

Q MS. NOBLE, LOOK AGAIN AT THE DOCUMENTS BEFORE YOU AT WHAT HAS BEEN MARKED AS PX-15.

HAVE YOU SEEN THIS DOCUMENT BEFORE?

A YES.

Q CAN YOU TELL ME WHAT IT IS?

A THIS IS A MEMO TO MR. DANIELS I WROTE ON THE TELEPHONE AND OTHER PROBLEMS ASKING FOR HIS HELP.

Q COULD YOU TELL US WHAT THE DATE IS OF THIS MEMO?

A MAY 12TH, 1980.

Q DID YOU PREPARE THIS MEMO?

A YES, I DID.

MR. LUTZ: I'D LIKE TO MOVE THE ADMISSION OF PX-15 INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MR. LEWIS: NO OBJECTION, YOUR HONOR.

THE COURT: IT WILL BE RECEIVED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT PX-15 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT PX-15 WAS RECEIVED INTO EVIDENCE.)

THE COURT: MS. LEWIS, WHEN THERE IS A MOTION, SO WE WILL SAVE SOME TIME, TO RECEIVE SOMETHING IN EVIDENCE, PLEASE INDICATE WITHOUT MY HAVING TO ASK YOU WHETHER YOU OBJECT OR NOT.

MS. LEWIS: I WILL, YOUR HONOR.

THE COURT: SO THE COURT REPORTER CAN HEAR YOU. THANK YOU.

GO AHEAD.

BY MR. LUTZ:

Q MS. NOBLE, IN THE SECOND PARAGRAPH OF PX-15 IT SAYS -- THE FIRST PARAGRAPH TALKS ABOUT TAMPERING WITH YOUR TELEPHONE, AND IT SAYS: THIS IS THE FOURTH SUCH INCIDENT WITH THE TELEPHONE SINCE I EXPERIENCED EEO DIFFICULTIES.

IS THAT ACCURATE, AS FAR AS YOU CAN REMEMBER?

A TO THE BEST OF MY KNOWLEDGE, YES.

Q HOW DID MR. DANIELS RESPOND TO THIS MEMO?

A HE TOLD ME TO CALL SECURITY.

Q THE SAME THING HE TOLD YOU BEFORE?

A YES.

Q BUT NOTHING ELSE?

A NOTHING ELSE.

Q LOOK AGAIN AT THE DOCUMENTS AT WHAT'S BEEN MARKED AS PX-14.

HAVE YOU SEEN THIS DOCUMENT BEFORE?

A YES.

Q PLEASE TELL US WHAT THIS IS MS. NOBLE?

A THIS IS ANOTHER REPORT OF THEFT. THIS ONE CONCERNS THE CHAIR.

Q DID YOU PREPARE THIS REPORT, MS. NOBLE?

A YES, I DID.

MR. LUTZ, I'D LIKE TO MOVE PX-14 INTO EVIDENCE, YOUR HONOR.

MS. LEWIS: NO OBJECTION, YOUR HONOR.

THE COURT: IT WILL BE RECEIVED.

DEPUTY CLERK: PLAINTIFF'S

EXHIBIT NO. 14 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT NO. 14 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q NOW, MS. NOBLE, COULD YOU LOOK IN THE DOCUMENTS BEFORE YOU AT WHAT HAS BEEN MARKED AS PLAINTIFF'S EXHIBIT 13?

AND I WANT TO KNOW WHETHER YOU HAVE SEEN THIS DOCUMENT BEFORE?

A YES.

Q CAN YOU TELL US WHAT IT IS?

A THIS IS A COPY OF A MESSAGE THAT WAS PUT ON MY DESK ONE DAY TO CALL THE EIA ADMINISTRATOR.

THE COURT: EXHIBIT NO. WHAT? WHAT EXHIBIT NUMBER?

MR. LUTZ: THIS IS 13, YOUR HONOR.

THE COURT: THANK YOU. GO AHEAD.

GO AHEAD, MS. NOBLE.

THE WITNESS: THE MESSAGE WAS TELLING ME TO CALL THE EIA ADMINISTRATOR, THAT I HAD AN APPOINTMENT WITH HIM.

BY MR. LUTZ:

Q IT SAYS ON ITS FACE THAT DR. MOSES'S OFFICE CALLED.

WAS DR. MOSES THE EIA ADMINISTRATOR?

A YES, HE IS, OR WAS, RATHER.

Q AND YOU SAID YOU FOUND THIS ON YOUR DESK ONE DAY; IS THAT RIGHT?

A YES.

Q COULD YOU LOOK AT THE SECOND PAGE OF PX-13?

MR. LUTZ: I MIGHT SAY, YOUR HONOR, THIS EXHIBIT IS ACTUALLY TWO DIFFERENT DOCUMENTS TOGETHER, BUT WE ARE OFFERING THEM AS A SINGLE EXHIBIT.

THE COURT: I SEE IT.

BY MR. LUTZ:

Q COULD YOU TELL ME WHAT THE SECOND PAGE IS, MS. NOBLE?

A YES. THIS IS MY NOTE TO BERNICE SOMERS, WHO WAS MY SUPERVISOR AT THE TIME, AND I AM SIMPLY POINTING OUT TO HER THAT THE MESSAGE WAS PHONY.

Q TELL ME HOW THAT HAPPENED.

HOW DID YOU DISCOVER THAT THE MESSAGE ON THE FRONT PAGE OF PX-13 WAS A FALSE MESSAGE?

A WELL, I CALLED DR. MOSES'S OFFICE AND SPOKE TO HIS SECRETARY WHO ASSURED ME THAT I HAD NO SUCH APPOINTMENT WITH DR. MOSES THAT DAY.

MR. LUTZ: I'D LIKE -- IF I HAVE NOT ALREADY -- TO MOVE PX-13 INTO EVIDENCE.

MS. LEWIS: NO OBJECTION, YOUR

HONOR.

THE COURT: IT WILL BE RECEIVED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NO. 13 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT NO. 13 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q MS. NOBLE, HAD YOU EVER RECEIVED SUCH PHONY MESSAGES BEFORE YOU FILED YOUR EEO COMPLAINT?

A NO.

Q AND WAS PLANTING FALSE MESSAGES A COMMON FORM OF AMUSEMENT IN OEIS?

A NO.

Q OTHER THAN TELLING YOU TO REPORT THE LOSS OF PROPERTY TO SECURITY, MS. NOBLE, ARE YOU AWARE WHETHER MR. DANIELS DID ANYTHING ELSE TO HELP YOU STOP THESE

INCIDENTS?

A NO.

Q HOW MANY TIMES DID YOU BRING THESE MATTERS TO HIS ATTENTION?

A OH, FREQUENTLY. AT LEAST FOUR OR FIVE.

Q WHAT PERIOD OF TIME DID THESE -- FOR WANT OF A BETTER TERM -- PRANKS AND TRICKS COVER?

A UP UNTIL ABOUT MAY OR JUNE OF 1980.

Q WHEN DID THEY BEGIN?

A WHEN I FIRST SOUGHT EEO COUNSELING.

Q WHAT WAS YOUR REACTION TO THESE TRICKS AND PRANKS?

A I WAS RATHER DISCONCERTED ABOUT THESE. I HAD SOUGHT EEO COUNSELING. I THOUGHT IT MAY IMPROVE THE SITUATION. THEN I WAS SLAPPED WITH THE OPEN LETTER.

I KNEW THAT SOMEBODY WAS DOING THIS, SOMEBODY THAT -- MAYBE SOMEBODY I WAS SUPPOSED TO HAVE SUPERVISED. BUT, AT ANY RATE, PEOPLE THAT I HAD WORKED WITH EVERY DAY AND ANY ONE OF THEM MIGHT. THEY HAVE BEEN CHILDISH, BUT THEY ALL ADDED UP.

Q I TAKE IT YOU MEAN THE TRICKS, NOT THE PEOPLE?

A YES, PARDON ME. THEY WERE UPSETTING.

Q DID THIS SERIES OF TRICKS AND PRANKS CREATE PROBLEMS FOR YOU IN PERFORMING YOUR JOB?

A YES, THEY DID.

Q. WHY?

A. WELL, IT GOES TO RESPECT AND TRUST. THESE ARE -- I KNEW SOMEBODY WAS DOING SOMETHING, AND I ALSO THOUGHT OR PERCEIVED THAT NOBODY WAS DOING IT --

TAKING STEPS TO CORRECT IT.

AND IT WAS JUST PRETTY DIFFICULT TO WORK THIS WAY WHEN -- I NEVER KNEW WHEN IT WAS GOING TO START OR STOP AGAIN. AS SOON AS I'D RELAX, SOMETHING ELSE WOULD HAPPEN, SOMEBODY WOULD PLAY A TRICK OR PULL A PRANK, GIVE ME A FALSE MESSAGE.

I EVEN HAD BEEN GETTING TELEPHONE REPAIR PARTS MYSELF. IT WAS JUST A VERY UNCOMFORTABLE WAY -- VERY AWKWARD WAY TO HAVE TO WORK. VERY UNPLEASANT, VERY DIFFICULT.

Q NOW, MS. NOBLE, DURING THE LATTER -- INTO THE LATTER HALF OF 1980, WAS THERE MUCH PROGRESS IN THE DOE'S PROCESSING OF YOUR DISCRIMINATION COMPLAINT?

A I CONTINUED TO HAVE MEETINGS AND CONVERSATIONS WITH BETTY PASS AND ALSO LATER A MAN NAMED LORENZO RICKS, BUT

THERE WAS NO RESOLUTION TO THE COMPLAINT IN 1980.

TOWARD THE END OF 1980 I LEARNED THAT THEY WERE OBTAINING AFFIDAVITS FROM SOME OF THE PEOPLE IN THE OFFICE, FOR EXAMPLE, RICHARD FRANCIS AND BERNIE MC KAY.

Q MS. NOBLE, IN DESCRIBING EVENTS THAT YOU HAVE TALKED ABOUT HERE IN 1980 AND LATE '79, YOU HAVE INDICATED THAT THEY WERE NOT LIKE ANYTHING YOU HAD FACED BEFORE YOU PURSUED YOUR EEO REMEDIES.

WAS THERE ANYTHING ELSE THAT HAPPENED AT OEIS IN 1980 THAT WAS SIGNIFICANTLY DIFFERENT THAN WHAT YOU HAD EVER EXPERIENCED BEFORE YOU FILED YOUR COMPLAIN?

A YES, THERE WAS ONE THING IN PARTICULAR.

Q WHAT WAS THAT?

A THERE WAS A GS-14 VACANCY IN THE OFFICE AT THE TIME THAT I APPLIED. I'D DONE THAT JOB BEFORE, I WAS QUALIFIED.

Q YES, WHAT WAS UNUSUAL ABOUT YOUR --

THE COURT: THAT DOESN'T READ VERY WELL. "I HAD DONE THAT JOB BEFORE. I WAS QUALIFIED."

NOW, UNLESS THE COURT REPORTER PUT A PERIOD THERE, AND I DON'T KNOW WHAT SHE PUT, WHAT DOES THAT MEAN?

THE WITNESS: I AM SORRY, YOUR HONOR. THE WHOLE RECOLLECTION IS VERY UPSETTING TO ME.

THE COURT: I UNDERSTAND, AND I AM NOT CRITICAL OF YOU. DON'T MISUNDERSTAND ME.

MR. LUTZ: I SEE YOUR POINT, YOUR HONOR. IT WOULD SEEM TO SUGGEST SHE HAD DONE THE JOB BEFORE SHE WAS QUALIFIED TO

DO IT.

BUT I THINK THAT WAS PROBABLY NOT THE BURDEN OF HER TESTIMONY.

THE WITNESS: SHALL I CLARIFY IT?

THE COURT: YES.

THE WITNESS: THERE WAS A GS-14 VACANCY IN THAT PARTICULAR OFFICE. IT WAS A POSITION THAT EARLIER I HAD EVEN FILLED. I WAS QUALIFIED FOR THE POSITION AND I APPLIED FOR THE POSITION.

THE COURT: AND WHAT HAPPENED?

THE WITNESS: WHAT HAPPENED?

THE COURT: DID YOU GET IT? THAT'S WHAT I WANT TO KNOW.

THE WITNESS: NO, I DID NOT GET IT.

THE COURT: THIS WAS BEFORE YOU FILED YOUR EEO COMPLAINT?

THE WITNESS: NO, AFTER I FILED THE EEO COMPLAINT.

THE COURT: THIS WAS AFTER. WHEN WAS THIS?

THE WITNESS: THIS WAS IN MARCH OR APRIL OF 1980.

THE COURT: WOULD THAT YOU HAVE REQUIRED YOU TO WORK WITH THE SAME PEOPLE WHO SIGNED THAT OPEN LETTER?

THE WITNESS: SOME OF THEM IT WOULD.

MR. LUTZ: YOUR HONOR, WE HAVE SOME DOCUMENTS WE WILL GO THROUGH AND I THINK THE SEQUENCE WILL BE A LITTLE CLEARER.

BY MR. LUTZ:

Q MS. NOBLE, COULD YOU LOOK AT WHAT HAS BEEN MARKED AS PLAINTIFF'S EXHIBIT 16?

HAVE YOU EVER SEEN THIS DOCUMENT BEFORE?

A YES.

Q CAN YOU TELL ME WHAT IT IS?

A THIS IS THE VACANCY ANNOUNCEMENT FOR THE 14 THAT I TOOK UP.

Q WHAT IS THE JOB? THIS IS THE JOB YOU APPLIED FOR IN APRIL OF 1980?

A YES.

Q WHAT IS THE JOB?

THE COURT: ENERGY INFORMATION CLEARINGHOUSE MANAGER. IT SAYS SO RIGHT ON THE EXHIBIT.

ARE YOU GOING TO MOVE EXHIBIT 16 INTO EVIDENCE?

MR. LUTZ: I CERTAINLY AM, YOUR HONOR.

MS. LEWIS: NO OBJECTION.

THE COURT: IT WILL BE RECEIVED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NO. 16 RECEIVED INTO EVIDENCE.)

(PLAINTIFF'S EXHIBIT NO. 16 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q AND THIS IS THE JOB YOU SAID YOU HAD PERFORMED AT AN EARLIER TIME AT OEIS?

A YES.

Q WHEN DID YOU HOLD THIS JOB?

A IN THE SUMMER OF 1978, MR. COUGHLAN APPOINTED ME TO THE POSITION FOR A PERIOD OF SEVERAL MONTHS.

HE THOUGHT THAT I COULD DO IT. HE TOLD ME I DID A GOOD JOB.

MS. LEWIS: I OBJECT, YOUR HONOR. THIS IS ALL HEARSAY.

MR. LUTZ: ADMISSION OF A PARTY OPPONENT, YOUR HONOR.

THE COURT: ALL RIGHT, I'LL LET IT IN.

BY MR. LUTZ:

Q MS. NOBLE, YOU HELD THE JOB; IS THAT RIGHT?

A YES.

Q DID YOU HOLD IT ON A TEMPORARY OR PERMANENT BASIS IN 1978?

A TEMPORARY BASIS.

Q WAS THIS A JOB ESSENTIALLY THE PERSON WHO RAN THE LEFT-HAND SIDE BOX OF EIAC ON THAT ORGANIZATION CHART I SHOWED YOU?

A YES. THIS IS THE VACANCY CREATED BY MR. DAUGHERTY WHEN HE LEFT THE GOVERNMENT.

Q NOW, IN APPLYING FOR THIS POSITION, ENERGY INFORMATION CLEARINGHOUSE MANAGER, DID YOU HAVE TO DO ANYTHING ELSE OTHER THAN SUBMIT AN APPLICATION?

A YES, I HAD TO GET A SUPERVISORY APPRAISAL FROM MY SUPERVISOR.

Q WHO WAS THAT?

A THAT WAS MR. DANIELS.

Q DID YOU GET SUCH AN APPRAISAL?

A YES, I DID.

Q COULD YOU LOOK AT WHAT'S BEEN MARKED AS PX-2? HAVE YOU SEEN THIS DOCUMENT BEFORE MS. NOBLE?

A YES.

Q IS THIS THE APPRAISAL THAT MR. DANIELS DID THAT YOU REFERRED TO IN CONNECTION WITH THE ENERGY INFORMATION CLEARINGHOUSE MANAGER POSITION?

A YES.

Q I WONDER IF WE COULD, FOR A MOMENT, JUST SO WE UNDERSTAND HOW THIS FORM WORKS, THE FIRST LINE UNDER THE HEADING RANKING FACTOR SAYS, I BELIEVE, DEMONSTRATED EXPERIENCE IN EFFECTIVELY DEALING WITH ALL LEVELS OF MANAGEMENT BOTH IN AND OUTSIDE THE GOVERNMENT.

NOW, AS YOU READ THIS FORM, WHAT HAS MR. DANIELS RATED YOU ON THAT QUALITY?

A AVERAGE, SATISFACTORY.

Q NOW, COULD YOU LOOK, MS. NOBLE, AT PX-1, WHICH IS THE NEXT --

MR. LUTZ: I'D LIKE TO MOVE PX-2 INTO EVIDENCE, YOUR HONOR.

MS. LEWIS: NO OBJECTION, YOUR HONOR.

THE COURT: PROCEED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NO. 2 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT NO 2 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q WOULD YOU LOOK AT PX-1, MS. NOBLE, WHICH IS THE NEXT DOCUMENT IN YOUR STACK?

HAVE YOU SEEN THAT DOCUMENT BEFORE?

A YES.

Q IS THIS ANOTHER APPRAISAL THAT MR. DANIELS DID OF YOU?

A YES, IT IS.

Q DID IT CONCERN ANOTHER JOB THAT YOU WERE SEEKING?

A YES, ANOTHER JOB THAT I APPLIED FOR AT THE TIME.

Q AND THIS WAS AT THE SAME TIME THAT YOU APPLIED FOR THE EIAC MANAGER JOB?

MS. LEWIS: YOUR HONOR, I OBJECT FOR A MOMENT. I CAN APPRECIATE MR. LUTZ'S ATTEMPT TO SPEED UP MATTERS HERE, BUT I HAVE BEEN SITTING AND LISTENING TO A HOST OF LEADING QUESTIONS FOR THE ENTIRE TIME HE HAS BEEN UP HERE.

THE COURT: LET ME JUST SAY THIS TO YOU, MS LEWIS. ALL HE HAS ASKED SO FAR, AS THE COURT RECALLS, IS WHAT MR. DANIELS RATED HER AS DESCRIBED IN

EXHIBITS 1 AND 2.

MS. LEWIS: I DON'T HAVE A PROBLEM WITH THAT ASPECT OF IT BUT --

THE COURT: I DON'T EITHER. WHAT IS YOUR COMPLAINT?

MS. LEWIS: ALL I AM SAYING, YOUR HONOR, IS I BELIEVE MR. LUTZ IS LEADING THE WITNESS.

IS THIS THE POSITION THAT HE RATED FOR YOU? IS THAT AROUND THE SAME TIME? ET CETERA, ET CETERA.

THE COURT: THAT IS ALL RIGHT. THE OBJECTION IS NOTED, IF YOU WANT.

MR. LUTZ: I WILL TRY TO ONLY LEAD IN MATTERS THAT I DON'T THINK ARE MUCH IN CONTROVERSY. THE RULES SAY I CAN USE IT TO DEVELOP TESTIMONY.

BY MR. LUTZ:

Q MS. NOBLE, PX -- DID MR. DANIELS GIVE YOU PX-1 AND PX-2?

A YES.

Q AND DO YOU RECOGNIZE THOSE TO BE HIS SIGNATURES AT THE BOTTOM OF PX-1 AND PX-2?

A YES.

MR. LUTZ: I'D LIKE TO MOVE PX-1 INTO EVIDENCE, YOUR HONOR.

MS. LEWIS: NO OBJECTION.

THE COURT: RECEIVED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NO. 1 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT NO. 1 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q NOW, MS. NOBLE, YOU EARLIER SAID THAT -- OR SUGGESTED THAT -- THE HANDLING OF THE GS-14 EIAC MANAGER JOB WAS SOMETHING UNLIKE ANYTHING THAT YOU HAD EXPERIENCED BEFORE YOU HAD FILED YOUR EEO COMPLAINT.

CAN YOU EXPLAIN WHAT YOU MEANT BY THAT IN CONNECTION WITH THESE APPRAISALS?

A YES. ON THE VERY DAY THAT I RECEIVED THESE APPRAISALS, MR. DANIELS GAVE ME A LETTER SEVERELY CRITICIZING MY WORK PERFORMANCE.

Q LET ME SHOW YOU --

DID THE LETTER DO ANYTHING ELSE OTHER THAN SEVERELY CRITICIZE YOUR WORK PERFORMANCE?

A IT WAS THREATENING TO WITHHOLD MY WITHIN GRADE.

Q YOUR WITHIN GRADE PAY RAISE?

A YES.

Q COULD YOU LOOK IN THE STACK OF DOCUMENTS AT WHAT'S BEEN MARKED AS PX-18?

HAVE YOU SEEN THAT DOCUMENT BEFORE?

A YES, THIS IS THE LETTER

THREATENING TO WITHHOLD MY WITHIN GRADE THAT I SPOKE OF.

Q WHEN DID YOU RECEIVE THIS DOCUMENT FROM MR. DANIELS?

A I RECEIVED IT ON APRIL 4TH, 1980.

MR. LUTZ: I'D LIKE TO MOVE PX-18 INTO EVIDENCE, YOU HONOR.

THE COURT: ANY OBJECTION?

MS. LEWIS: NO OBJECTION.

THE COURT: RECEIVED.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NO. 18 RECEIVED INTO EVIDENCE.

(PLAINTIFF'S EXHIBIT NO. 18 WAS RECEIVED INTO EVIDENCE.)

BY MR. LUTZ:

Q AND YOU SAY YOU RECEIVED THAT AROUND APRIL 4TH.

WHEN DID YOU RECEIVE PX-1 AND PX-2, MS. NOBLE?

A ALSO ON APRIL 4TH. THEY ARE

DATED APRIL 2ND, BUT APRIL 4TH IS THE DATE I RECEIVED THEM FROM MR. DANIELS.

Q DID YOU FIND ANYTHING UNUSUAL ABOUT GETTING THESE THREE DOCUMENTS ALL AT THE SAME TIME, MS. NOBLE?

A. YES, I WAS ASTONISHED.

Q. WHY WERE YOU ASTONISHED?

A BECAUSE OF THE MIXED SIGNALS. I WAS, ON THE ONE HAND, GETTING THE APPRAISALS WHICH CONTRADICT AND ARE AT ODDS WITH WHAT HE IS TELLING ME IN THE WITHIN GRADE LETTER.

Q NOW, WHAT WAS YOUR REACTION TO ALL OF THIS?

A I WASN'T TOO HAPPY. I WAS BEWILDERED, CONFUSED.

APPENDIX F

Excerpt From John Daniel's

District Court Testimony

Dorothy L. Noble

vs.

John S. Herrington

Civil Action No. 85-1507

TRIAL TRANSCRIPT PAGES 312,313

Q. Did you have in mind of detailing Ms. Noble permanently out of OEIS?

A. If it would work out well with her and work out well with the receiving office.

I didn't have in mind to force her. I was trying to work things out for Ms. Noble's best interests.

Q. Do you think Ms. Noble should leave a job she liked in order to get away from the tricks and open letter?

A. I think many times in an employee's career they have to leave and go to other jobs, because of things they find unpalatable in an office situation.

Q. So your answer to my question is yes?

A. I would have. So I guess if we reversed the situation and put me in Ms. Noble's place, I would have. I would have been typing 171's and bidding on jobs all over Washington, D.C.

And I have done that in the past. I have had situations where I had supervisors I didn't hit it off with and working environments I didn't like. Maybe I shouldn't be saying this.

APPENDIX G

Excerpt From Petitioner's

Expert Witness Testimony

Dorothy L. Noble

vs.

John S. Herrington

Civil Action No. 85-1507

TRIAL TRANSCRIPT PAGE 519

A. AND I THINK THAT HAVING PURSUED THE SOCIALLY AND LEGALLY PROVIDED OPTIONS FOR TRYING TO COPE WITH THE SITUATION, AND HAVING SEEN NOT ONLY THAT THEY WERE NOT PROTECTED, BUT THAT SHE WAS ACTUALLY HARMED BY THE FAILURE OF THE MANAGERS TO STEP IN AND CORRECT SOME DIFFICULTIES IN A PROMPT AND APPROPRIATE WAY, I THINK THAT SHE WOULD THEN TURN TO THE OTHER MAJOR OPTION, WHICH WOULD BE TO LEAVE.

Q. YOU THINK AN AVERAGE PERSON WOULD ALSO DO THE SAME THING?

A. WELL, YES. WHAT I AM SAYING IS THAT I THINK GIVEN THESE FACTS THAT THE AVERAGE PERSON WOULD TEND TO TURN IN THESE CIRCUMSTANCES TOWARD LEAVING AND THAT THAT WOULD BE A COMMON AND ADAPTIVE RESPONSE FOR THE AVERAGE PERSON IN THESE CIRCUMSTANCES.

AND FURTHER, I WOULD THINK, AS A

CLINICIAN, THAT IF THESE CIRCUMSTANCES WERE THE CASE, THAT IT WOULD BE UNREASONABLE FOR THE AVERAGE PERSON TO STAY IN THAT KIND OF HOSTILE, DISRUPTIVE, IMPAIRED WORK ENVIRONMENT.

APPENDIX H

Applicable Statutes

717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a)

717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c)

28 U.S.C. § 1254(1)

42 U.S.C. § 2000e-5(g)

28 U.S.C. § 1343

42 U.S.C. § 2000e-5(k)

42 U.S.C. § 2000e-3(a)

APPENDIX H

1. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a)

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds, in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c)

"Within thirty (30) days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national original, brought pursuant to

subsection (a) of this section, Executive Order 11,478 or any succeeding Executive Orders, or after one hundred and eight days from the filing of the initial charge with the department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

2. 28 U.S.C. § 1254(1)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals amy be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . .

3. 42 U.S.C. § 2000e-5(g)

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other

equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. INterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 20003-3(a) of this title."

4. 28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs

mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relieve under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section --

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (June 25, 1948, ch 646, § 1, 62 Stat. 932; Sept. 3, 1954, ch 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, P. L. 85-315, Part III, 21 121, 71 Stat. 637; Dec. 29, 1979, P.L. 96-170, § 93 Stat. 1284.)

5. 42 U.S.C. § 2000 e-5(k)

"In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing

party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

6. 42 U.S.C. § 2000 e-3(a)

"It shall be an unlawful employment practice for any employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter [42 U.S.C. §§ 2000e to 2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [42 U.S.C. §§ 2000e to 2000e-17].

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No. 89-74

In the Supreme Court of the United States

OCTOBER TERM, 1989

DOROTHY L. NOBLE, PETITIONER

v.

JAMES D. WATKINS, SECRETARY,
UNITED STATES DEPARTMENT OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was prejudiced when the district court, on the basis of the unchallenged findings of an EEOC examiner that petitioner sought to enforce, granted her motion for summary judgment on her claim that her co-workers had retaliated against her for filing a sex discrimination claim without further ruling on her reprisal contentions.

2. Whether the district court and the court of appeals correctly denied petitioner's constructive discharge claim.

3. Whether the district court's award of attorney's fees, which reflected petitioner's limited success, was proper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1D-7D) is unreported. The opinion of the district court (Pet. App. 1C-54C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1989. A petition for rehearing was denied on April 17, 1989. The petition for a writ of certiorari was filed on July 17, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was a GS-13 Publications and Marketing Specialist for the Department of Energy (DOE). In 1981, after an EEO Counselor had failed to resolve to her satisfaction her allegations that she had been discriminated against on the basis of sex, she filed a complaint with the Equal Employment Opportunity Commission (EEOC). In addition to claiming that she had suffered from sex discrimination, petitioner alleged that other employees had retaliated against her because she had complained to the EEOC Counselor.

After conducting a hearing at which 24 witnesses testified, the EEOC examiner rejected petitioner's claims that she had suffered from discrimination. With respect to her claim that her supervisor admonished her especially harshly about her failure to meet deadlines, the examiner found that petitioner "has failed to show with respect to admonishments that she was treated differently from her male coworkers." Pet. App. 29A-30A. The examiner similarly concluded that there was no merit to her contentions that she had been denied desirable assignments or supervisory training. *Id.* at 30A-34A.

The examiner did conclude, however, that there was merit to her claim that she had suffered reprisals. Specifically, the examiner found that her co-workers had improperly signed an open letter stating that they were aware of her complaints and thought they were unfounded. Pet. App. 38A-39A. The examiner also noted that her co-workers had played "tricks" on her, such as removing her nameplate from her desk and placing it on the door to the copy room. *Id.* at 40A. However, the examiner found, contrary to petitioner's contention, that grievances filed by some

of the employees she supervised had not been brought to harass her, but were "legitimate in view of [petitioner's] failure to perform her responsibilities." *Id.* at 42A. The examiner further found that, while her co-workers had attempted to force her to drop her charges of discrimination, there was no merit to her claim that her retirement had been caused by the actions of her co-workers so that she was, in effect, constructively discharged. *Id.* at 47A-48A. The examiner ordered DOE to "educate those employees who harassed [petitioner] on their responsibility not to abuse either the grievance/arbitration machinery or the employment discrimination process." *Id.* at 50A.

Petitioner then filed suit in district court. Shortly before trial, she moved for summary judgment on her reprisal claim because DOE had not appealed. After trial, the court granted her motion, but added that she could not seek to "rest on an already adjudicated finding of reprisal *and* to obtain additional relief based on a reappraisal of the portions of her reprisal claims that were rejected at the administrative level." Pet. App. 13C. The court ordered DOE to "establish a training and counseling program for all its managers and supervisory personnel to the end that no further retaliatory actions will take place against its employees." *Id.* at 52C.

The court next rejected petitioner's sex discrimination claim. The court concluded that the evidence showed that petitioner "was a notably uncooperative worker who refused to assume responsibilities expected from a professional of her rank and tenure." Pet. App. 29C. "Time and again, [petitioner] failed to meet deadlines for submission of her work, and time and again she failed to offer any acceptable ex-

planation for her poor performance." *Ibid.* Moreover, the court added, petitioner's "relationships with superiors, colleagues, and subordinates were racked with conflict." *Id.* at 30C. The court concluded that she had been "an inept and unsatisfactory manager and worker who brought whatever difficulties she experienced upon herself." *Id.* at 32C.

The court also rejected her constructive discharge claim. Citing *Clark* v. *Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981), the court stated that "[t]o sustain a constructive discharge claim, [petitioner] must show that her employer intentionally made her working conditions so intolerable that a reasonable person would be forced to resign." Pet. App. 35C. The court found that her supervisors had moved promptly to stop the "tricks" played by her co-workers once she reported them and that she resigned more than a year after they ceased. *Id.* at 37C n.9, 39C. It concluded that "the evidence clearly shows that [petitioner] was not 'forced' to resign but welcomed the opportunity to take early retirement." *Id.* at 40C.

The court of appeals summarily affirmed, holding that "the district court's factual findings are not clearly erroneous." Pet. App. 2D.

ARGUMENT

Petitioner first claims (Pet. 18-23) that, by granting her motion for summary judgment on her reprisal claim, the district court denied her right to de novo review of the reprisal claim. Review is not warranted to consider this contention. As an initial matter, it does not seem unfair to hold that petitioner could not both enforce and challenge the examiner's findings with respect to the reprisal issue. In any event, she was not prejudiced. Because her motion for summary

judgment was filed shortly before trial, the court did not act on it until after it had heard all the evidence. Pet. App. 13C. It then noted that it would consider the reprisal evidence insofar as it was relevant to her constructive discharge and sex discrimination claims, since petitioner contended that the evidence was relevant to those claims. *Id.* at 14C n.4. Because the court found in petitioner's favor on her reprisal claim and considered all the evidence of reprisal that she presented in considering her other claims, there is no merit to her complaint that she was prejudicially denied de novo review.

Petitioner next contends (Pet. 23-27) that the district court erred in its treatment of her constructive discharge claim. Specifically, she contends that the court misapplied *Clark* v. *Marsh*, which, petitioner states, ruled that the standard to be applied to such claims is "whether the employer deliberately made working conditions so intolerable as to drive the employee into an 'involuntary quit.'" Pet. 25. According to petitioner, the district court departed from this standard when it stated that petitioner had to "show that her employer intentionally made her working conditions so intolerable that a reasonable person would be forced to resign." Pet. App. 35C. But whatever differences there may be between the court of appeals' statement of the rule and the district court's phrasing of the standard (and petitioner suggests none), they surely made no difference here, where the district court concluded that petitioner welcomed the opportunity to take early retirement. *Id.* at 40C.

Finally, petitioner argues (Pet. 27-28) that she should have been awarded attorneys' fees because she presented "colorable" claims. As an initial matter,

attorneys' fees are not warranted under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) merely because a plaintiff presented a colorable claim; the plaintiff must prevail. *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 & n.7 (1983). Moreover, it should be noted that petitioner was awarded more than $46,000 in attorneys' fees by the district court.* In light of petitioner's limited success, that award was generous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

SEPTEMBER 1989

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* Petitioner included an interim order of the district court denying attorneys' fees in the appendix to her petition (Pet. App. B), but not the order awarding fees. We have lodged a copy of that order with the Clerk of the Court.

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